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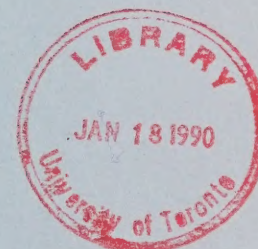
VOLUME: 170

DATE: Tuesday, January 9th, 1990

BEFORE: M.I. JEFFERY, Q.C., Chairman

E. MARTEL, Member

A. KOVEN, Member



FOR HEARING UPDATES CALL (TOLL-FREE): 1-800-387-8810

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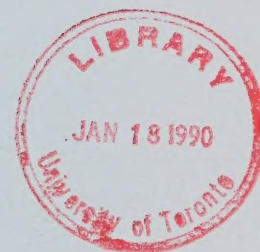
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EA-87-02

HEARING ON THE PROPOSAL BY THE MINISTRY OF NATURAL
RESOURCES FOR A CLASS ENVIRONMENTAL ASSESSMENT FOR
TIMBER MANAGEMENT ON CROWN LANDS IN ONTARIO

IN THE MATTER of the Environmental
Assessment Act, R.S.O. 1980, c.140;

- and -

IN THE MATTER of the Class Environmental
Assessment for Timber Management on Crown
Lands in Ontario;

- and -

IN THE MATTER OF a Notice by the
Honourable Jim Bradley, Minister of the
Environment, requiring the Environmental
Assessment Board to hold a hearing with
respect to a Class Environmental
Assessment (No. NR-AA-30) of an
undertaking by the Ministry of Natural
Resources for the activity of timber
management on Crown Lands in Ontario.

Hearing held at the Ramada Prince Arthur
Hotel, 17 North Cumberland St., Thunder
Bay, Ontario, on Tuesday, January 9th,
1990, commencing at 9:00 a.m.

VOLUME 170

BEFORE:

MR. MICHAEL I. JEFFERY, Q.C.	Chairman
MR. ELIE MARTEL	Member
MRS. ANNE KOVEN	Member

A P P E A R A N C E S

MR. V. FREIDIN, Q.C.)	
MS. C. BLASTORAH)	MINISTRY OF NATURAL
MS. K. MURPHY)	RESOURCES
MS. Y. HERSCHER)	
MR. B. CAMPBELL)	
MS. J. SEABORN)	MINISTRY OF ENVIRONMENT
MS. B. HARVIE)	
MR. R. TUER, Q.C.)	ONTARIO FOREST INDUSTRY
MR. R. COSMAN)	ASSOCIATION and ONTARIO
MS. E. CRONK)	LUMBER MANUFACTURERS'
MR. P.R. CASSIDY)	ASSOCIATION
MR. H. TURKSTRA	ENVIRONMENTAL ASSESSMENT
	BOARD
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DR. T. QUINNEY)	ANGLERS & HUNTERS
MR. D. HUNTER)	NISHNAWBE-ASKI NATION
MS. N. KLEER)	and WINDIGO TRIBAL COUNCIL
MR. J.F. CASTRILLI)	
MS. M. SWENARCHUK)	FORESTS FOR TOMORROW
MR. R. LINDGREN)	
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MR. Y. GERVAIS)	ONTARIO TRAPPERS
MR. R. BARNES)	ASSOCIATION
MR. R. EDWARDS)	NORTHERN ONTARIO TOURIST
MR. B. McKERCHER)	OUTFITTERS ASSOCIATION

APPEARANCES: (Cont'd)

MR. L. GREENSPOON) MS. B. LLOYD)	NORTHWATCH
MR. J.W. ERICKSON, Q.C.) MR. B. BABCOCK)	RED LAKE-EAR FALLS JOINT MUNICIPAL COMMITTEE
MR. D. SCOTT) MR. J.S. TAYLOR)	NORTHWESTERN ONTARIO ASSOCIATED CHAMBERS OF COMMERCE
MR. J.W. HARBELL) MR. S.M. MAKUCH)	GREAT LAKES FOREST
MR. J. EBBS	ONTARIO PROFESSIONAL FORESTERS ASSOCIATION
MR. D. KING	VENTURE TOURISM ASSOCIATION OF ONTARIO
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MR. G.J. KINLIN	DEPARTMENT OF JUSTICE
MR. S.J. STEPINAC	MINISTRY OF NORTHERN DEVELOPMENT & MINES
MR. M. COATES	ONTARIO FORESTRY ASSOCIATION
MR. P. ODORIZZI	BEARDMORE-LAKE NIPIGON WATCHDOG SOCIETY

(iii)

APPEARANCES: (Cont'd)

MR. R.L. AXFORD	CANADIAN ASSOCIATION OF SINGLE INDUSTRY TOWNS
MR. M.O. EDWARDS	FORT FRANCES CHAMBER OF COMMERCE
MR. P.D. McCUTCHEON	GEORGE NIXON
MR. C. BRUNETTA	NORTHWESTERN ONTARIO TOURISM ASSOCIATION

I N D E X O F P R O C E E D I N G S

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1 ---Upon commencing at 9:00 a.m.

2 THE CHAIRMAN: Welcome back everyone.

3 Good morning.

4 Well, ladies and gentlemen, we delayed
5 coming in slightly this morning because of the fact
6 that the return of the motion brought by Mr. Freidin on
7 behalf of MNR - this arose out of a question raised
8 initially by Mr. Colborne - was returnable for 9:00
9 a.m. today. We thought we would wait to start this
10 since the return of the motion is for 9:00 a.m.

11 Mr. Martel advises that Mr. Colborne just
12 left the room for a few moments, so we should probably
13 wait for his return since he's probably the most
14 interested in the disposition of this particular
15 motion.

16 Mr. Freidin, do you have any further
17 material to file in support of this motion?

18 MR. FREIDIN: No material other than if
19 you wanted to make as an exhibit the Notice of Motion,
20 but I think I have already filed the EA update and the
21 section or portion of the Ontario regulation we are
22 relying on. I don't intend to rely on anything other
23 than again the Notice of Motion and those two documents
24 I have already filed. I have extra copies of those if
25 you would like them.

1 THE CHAIRMAN: Yes, if you wouldn't mind
2 giving us extra copies of that, if you have them.

3 MR. FREIDIN: Would you like me to file
4 the Notices of Motion as well? You may have copies,
5 but did you want to make them exhibits; not that I am
6 interested in proceeding to a thousand too quickly.

7 THE CHAIRMAN: Well, I don't know that
8 it's necessary to make the actual Notice of Motion an
9 exhibit.

10 MR. FREIDIN: Okay. So I can file then
11 the copy of the EA update of October 1976, Volume 1,
12 No. 1 and also, and I just have the last page of
13 Ontario Regulation 205 for '87 which contains Section 9
14 which is the section that I am relying on.

15 How many copies?

16 THE CHAIRMAN: Sorry?

17 MR. FREIDIN: How many copies?

18 THE CHAIRMAN: Mrs. Koven has one; two if
19 you have them.

20 MR. FREIDIN: (handed)

21 THE CHAIRMAN: Have either of these
22 documents been previously filed, Mr. Freidin?

23 MR. FREIDIN: Not filed, they were
24 provided to the Board and to all the parties. They
25 weren't filed in terms of being marked as exhibits.

1 THE CHAIRMAN: I don't feel it's
2 necessary to mark these as well. These support the
3 motion per se. We will just keep all the material
4 together.

5 Very well.

6 MR. FREIDIN: Mr. Chairman, there are two
7 Notices of Motion before you. The first one I would
8 like to deal with is the one which basically deals with
9 the jurisdiction of the Board to deal with certain
10 matters; the second Notice of Motion is one which is a
11 request for particulars and I will deal with that next.

12 My submissions will be brief as I really
13 have very little to say other than what I submitted on
14 November the 28th, 1989, and you will find those
15 submissions, Mr. Chairman, in Volume 162, pages 28830
16 to 37.

17 Very briefly you will recall that the
18 statement of issues of both Treaty No. 3 and the
19 statement of issues of the Nishnawbe-Aski Nation raised
20 issues in relation to the allocation of the resource.

21 Quoting from Nishnawbe-Aski Nation, for
22 example, the issue or statement of issues states in
23 part that:

24 "The activities of the undertaking as
25 proposed by MNR do not include the

1 activity of allocation of the resource."

2 Similar wording is used in the statement
3 of issues of Panel No. 17. There is reference to
4 licensing and, for the purposes of my motion, Mr.
5 Chairman, I equate the term allocation of the resource
6 and the granting of licences. There is also reference
7 not only to the granting of licences, in general terms,
8 there is also reference to matters such as the size of
9 licensed areas, particularly there is reference to that
10 in the statement of issues of Treaty No. 3 and there is
11 reference as well in that statement of issues to the
12 provisions of jobs, contracts and benefits of that ilk
13 as to how those should be provided.

14 My submissions, Mr. Chairman, are that
15 those issues which I've enunciated are not within the
16 jurisdiction of the Board, and by that I mean that the
17 Board does not have the jurisdiction to make an order
18 directing how those licences should be granted, to whom
19 they should be granted, the size of the areas which
20 those licences should refer to, whether they should be
21 smaller or larger than they are at the present time.
22 It's my submission that those matters are beyond the
23 jurisdiction of the Board by reason of the regulation
24 that I have referred to, Ontario Regulation 205 for '87
25 which indicates in Section 9, and I quote:

1 "The undertaking of making a loan, giving
2 a grant, giving a guarantee of debts or
3 issuing or granting a licence, permit,
4 approval, permission or consent is exempt
5 from the provisions of subsection 5, sub
6 1 of the Act."

7 I also rely on the Environmental
8 Assessment Update Document issued by the Environmental
9 Assessment Branch in October of 1976 and, in my
10 submission, that document supports the submission I
11 have made. It basically does so on page 2 in its
12 commentary on Section 9 of the regulation.

13 In effect it is saying that the purpose
14 of the Act is to examine activities and by that, in the
15 terms of this case, that means the activities which
16 occur in the forest; the activities which it refers to
17 are the activities of timber management, the activities
18 of access, harvest, renewal and maintenance. The Act
19 does not to deal with the issue of licensing which
20 might facilitate or does facilitate the implementation
21 of those activities in the forest.

22 I'm not going to take a lot of time
23 anticipating the submissions of Mr. Colborne and
24 others, who I understand oppose my motion, but let me
25 just make three points, Mr. Chairman. It is clear in

1 my submission that it is the intention of Mr. Colborne
2 and perhaps others to canvass the issue as to who gets
3 licensed or who actually becomes involved in carrying
4 out these activities, and that is an issue which this
5 Board should deal with and make some order saying these
6 people should do it or these people should have
7 preferential rights in terms of doing these things, and
8 I say that that is an intention - that's my
9 interpretation - and I refer you to the transcript for
10 November the 28th, 1989 at page 28862 where Mr.
11 Colborne was asked a question by me during the scoping
12 session, and it was in relation to an issue that they
13 raised. The issue they raised was:

14 "Why were there no alternatives examined
15 which involved the merits of more
16 government as opposed to private
17 participation in management and vice
18 versa.

19 And just for purposes of
20 clarification, Mr. Colborne..."

21 I asked:

22 "...can you advise whether you were
23 referring to participation in management
24 planning in that context or are you
25 talking about who actually gets involved

1 in carrying out the activities.

2 MR. COLBORNE: I had in mind both."

3 Now, I have got no problem with people
4 coming forward in terms of planning and saying they
5 should have more involvement in planning, we dealt with
6 that in Panel 15, but to take it the next step to talk
7 about who actually gets involved in that, in my
8 submission, is not contemplated by reason of the
9 regulation.

10 THE CHAIRMAN: Involved in what, involved
11 in carrying out the activities?

12 MR. FREIDIN: Yes. Who gets the right,
13 who gets the allocation; in other words, to carry out
14 these activities you have got to have a licence.

15 Now, comment by Mr. Colborne, the second
16 comment in my view which demonstrates clearly the
17 breadth of his intended cross-examination and that he
18 intends to get into the issue of legal rights to land
19 or entitlement to the resource I think is also clear,
20 and I would refer you in that regard to page 28865 and
21 66 of the transcript and Mr. Colborne says at 28865:

22 "That will be the subject of a great deal
23 of my client's evidence, that it is the
24 Ministry of Natural Resources that has
25 destroyed the native economies and that

1 the Ministry of Natural Resources is the
2 very specific source of a high proportion
3 of the problems within the native
4 community, the problem being that the
5 Ministry of Natural Resources has denied
6 my clients access to the lands and
7 resources to which they say they have not
8 only legal title, but a general right to
9 derive a benefit from."

10 The third point I want to make is that my
11 motion is not directed only at native peoples but the
12 parties who are native people, it just happens that the
13 issue has been raised in the statement of issues of
14 those particular parties.

15 Mr. Colborne made a comment on page 28878
16 of the transcript, and this was during some questions
17 of Mrs. Koven of Mr. Colborne, as to really what was
18 the scope of what he was seeking from the Board. And
19 in part of that response he said:

20 "I cannot bring evidence on behalf of my
21 clients that does not deal with
22 entitlement because that is the basis of
23 their political stance in relation to the
24 proponent..."

25 So that also deals with the second issue

1 I mentioned, entitlement. He says:

2 "...but the evidence would not
3 necessarily be different than evidence
4 that might be called, for instance, by
5 the Municipality of Red Lake which is one
6 of the parties if the members of that
7 municipality said that as a result of the
8 planning and management process they
9 were, as a community of people, denied
10 access to the benefit of the resource
11 that surrounded them."

12 Now, Mr. Chairman, I don't believe the
13 situation would be any different for the Town of Red
14 Lake if they come to the Board and seek the Board to
15 make some provision in terms of how the licensing
16 scheme should work or how monies should be returned to
17 the community that are generated as a result of timber
18 management. Those matters, in my recollection, have
19 already been raised on two occasions; once at the
20 community visit in Dryden, it was also raised during
21 the cross-examination in Panel No. 15 and I believe Mr.
22 Martel was involved in the discussions on both
23 occasions, and it was my submission at that time, I
24 think on both occasions, particularly in Panel 15, that
25 that whole issue of monies being returned to the

1 community and the benefits that the community might in
2 fact receive in that regard as a result of timber
3 management were not matters which are controlled by the
4 Ministry of Natural Resources but rather those are
5 government matters.

6 And if you will recall when I asked the
7 representative of Red Lake in Dryden whether in fact he
8 felt that the matters that he was concerned about which
9 he raised in Dryden were matters that the Ministry of
10 Natural Resources had control over, my recollection
11 is - and I apologize for not having the transcript - my
12 recollection was he said no, they are not.

13 Now, if they are not within the control
14 of the Ministry of Natural Resources then, in my
15 submission, for that reason as well the Board doesn't
16 have the jurisdiction to order the proponent to
17 alleviate that problem.

18 Now, my Notice of Motion, Mr. Chairman,
19 you will note in addition to the very general order
20 that I am seeking which is set out in the second full
21 paragraph of the Notice of Motion sets out a number of
22 specific issues which were raised in the statement of
23 issues of Treaty No. 3 really, and if I can just very
24 briefly comment on each of them. Actually, Mr.
25 Chairman, I don't really believe I have to, I think I

1 would be just basically repeating myself if I did that.

2 Those are the submissions I would like to
3 make in relation to that particular Notice of Motion.

4 Mr. Chairman, in relation to the second
5 one, I'm now of the view that it perhaps may not be
6 necessary for me to proceed with that. I'm concerned
7 about the length of time that it might take to deal
8 with that motion and the benefits which might in fact
9 arrive.

10 I want to just make it clear, and I will
11 indicate to you the reason I was concerned about that
12 particular paragraph, is that I am concerned that in
13 this panel the Board does not allow a repetition or a
14 recanvassing of the issues which have already been
15 dealt with and the issues about which there has been a
16 full opportunity to canvass.

17 If Mr. Colborne is saying that what he
18 wants to cross-examine on and discuss are the effects
19 of the undertaking on native people, the effects of the
20 actual activities on the native people, then in my
21 submission I say that is not properly the subject
22 matter of this panel, that full opportunity was
23 provided and taken by all parties in Panel 7 to 14 in
24 relation to that.

25 Secondly, if he or any other party - and

1 I think these submissions go to any party - want to
2 cross-examine that the planning process does not
3 adequately address native concerns or the concerns of a
4 particular party or provide for an acceptable level of
5 input or involvement in the actual decision-making,
6 that is a matter of planning which was dealt with in
7 Panel 15 and there was little cross-examination on it.

8 If the purpose of the cross-examination
9 is to address the issue of legal entitlement to land or
10 resources, we had submissions on that matter during
11 Panel No. 6. My understanding was that the Board
12 indicated that those matters were to be dealt with by
13 the courts and that was not a matter that was going to
14 be addressed by this Board.

15 And to the extent that any
16 cross-examination by Mr. Colborne or others might be
17 intended to elicit evidence to establish that the
18 Ministry of Natural Resources or some other government
19 ministry, through actions not related to timber
20 management, have caused some undesirable situation -
21 you recall Mr. Colborne indicated one of the things he
22 wanted to talk about was the manner in which the
23 Ministry of Natural Resources prosecuted offences under
24 the Game and Fish Act - that in my submission is not a
25 subject matter which is related to timber management;

1 access, harvest, renewal or maintenance; and, as a
2 result, is a matter which is not relevant to any of the
3 issues before the Board and those sorts of
4 cross-examinations should not be permitted.

5 Now, Mr. Chairman, to conclude I want to
6 go back and just make two points. We heard the Notice
7 of Motion where I made my submissions back in November.
8 You asked me whether I was making a submission that the
9 Board was in some way limited in terms of making terms
10 and conditions related to the activities and I said no,
11 and I want to repeat that I am not saying the Board is
12 limited in that regard.

13 If you think that there is an activity -
14 access, harvest, renewal or maintenance - which is
15 being carried out or should be carried out in a certain
16 way in order to adequately protect the environment,
17 then you have full jurisdiction to so state. And when
18 a licence is issued any licensee has to abide by the
19 law of the land, they have to abide by the criminal
20 code, they will have to abide by the law which is
21 imposed by this Board by way of terms or conditions as
22 to how you can carry out those activities.

23 So although there may not be an express
24 listing in every licence which says these are the terms
25 or conditions as to how you implement those activities,

1 by law they will have to comply with those.

2 In fact, it's the Ministry of Natural
3 Resources that has to comply with it and they will have
4 to, through some mechanism, ensure that they are
5 complied with because it's the Ministry of Natural
6 Resources as the proponent who suffers the possible
7 ramifications of non-compliance with the terms of
8 approval.

9 The last matter I want to address is the
10 comment that you made I think during the scoping
11 session as to: Well, maybe we should just allow the
12 cross-examination because it's not going to take very
13 long and then we will just move on, it will take us
14 more time to argue the motion. I think it probably
15 will take us more time to argue the motion than it
16 might have taken to allow the questions.

17 My concern is not only with the
18 cross-examination, my concern is, if I am correct, that
19 the issues which are being raised as I have
20 characterized them are not within the jurisdiction of
21 the Board, if that matter is not resolved but is left
22 hanging, then I would anticipate that there will be
23 evidence prepared, time and money will be spent for
24 preparing evidence, other parties preparing evidence to
25 address those issues, time and money will be spent by

1 parties cross-examining people on that evidence, and if
2 the Board can make a decision on that now which
3 basically says that it's not properly the subject
4 matter of this hearing, then it would achieve one of
5 the prime goals as I understand it, Mr. Chairman, at
6 least by way of a procedural matter of the Board and,
7 that is, to move this hearing along.

8 So I'm not just concerned about
9 shortening the length of time of Panel 17. I see some
10 benefit in the longer term and that was the reason and
11 one of the main reasons that I was insistent, if I can
12 use that word, as I was back in the scoping session,
13 that I thought it would be desirable to deal with this
14 matter now.

15 And those are my submissions, Mr.
16 Chairman.

17 THE CHAIRMAN: Thank you. Mr. Colborne?

18 MR. COLBORNE: Mr. Chairman, Mr. Hunter
19 had indicated to me earlier that due to his time
20 commitments today he would like to go first.

21 THE CHAIRMAN: Very well.

22 MR. HUNTER: I thought Mr. Cassidy --

23 MR. CASSIDY: No.

24 MR. HUNTER: Thank you, Mr. Chairman.

25 Mr. Colborne and Mr. Lindgren have

1 graciously allowed me to go first. I didn't know what
2 the procedure would be.

3 Mr. Chairman, please allow me a moment
4 to - I think I have organized the materials. I
5 received the motion just prior -- or, sorry, I didn't
6 receive it, the motion arrived just prior to Christmas
7 so we have been scrambling over the weekend to try to
8 put together a response.

9 I'm going to be referring to several
10 pieces of information during the course of my
11 presentation which I hope will only be 15 or 20
12 minutes. All of these materials have been filed before
13 you except for Ontario Regulation 205/87. I believe
14 you have the last page which has Section 9 on it and in
15 my argument I was going to refer to other sections of
16 that regulation.

17 Now, I only have two copies. So perhaps
18 if I were to give you one, is that acceptable?

19 THE CHAIRMAN: That will be sufficient
20 for now. We can have other copies made.

21 MR. HUNTER: (handed)

22 THE CHAIRMAN: Thank you.

23 MR. HUNTER: Mr. Chairman, Mr. Martel,
24 Ms. Koven, the essence of our position is, is that the
25 Board ought to reject the motion brought by the

1 Ministry firstly because we do not believe that Section
2 9 in Regulation 205/87 provides the legal authority for
3 this motion in total and definitely with respect to
4 certain aspects of the motion and that you ought to
5 look at that issue in terms of the full requirements of
6 Ontario Regulation 205 and, in our view, the intent of
7 that regulation, and I will argue that in a few
8 moments, and with specific reference to Section 9 and
9 Section 10 of the same regulation.

10 Further, I believe that the motion as
11 presented by the Ministry is so broad that effectively
12 if a Board were to accept this motion in its entirety
13 then it would negate substantive reasons for the
14 participation of my client in this hearing.

15 We believe that the Ministry of Natural
16 Resources itself has led evidence, in terms of its
17 direct evidence and in terms of evidence provided in
18 cross-examination, that not only are contemplated in a
19 general sense within the terms of this motion but we
20 hope to demonstrate to you there are specific areas
21 which are affected by this motion in terms of evidence
22 presented by MNR.

23 The first point I would refer to -- let
24 me give you an indication of the materials I am going
25 to refer to, if that would be of some assistance, so

1 you have some general sense on where we are going.
2 Obviously Section 9 of Ontario Regulation 205, Section
3 10 of Ontario Regulation 205, the Notice of Motion
4 filed by the Ministry, the Environmental Assessment
5 Act, the EA Update which has been provided to you by
6 Mr. Freidin, the Crown Timber Act, the Class Assessment
7 Document, the Timber Management Planning Manual, the
8 Report on Treaty and Aboriginal Rights by Mr. Crystal
9 which formed part of the Panel 6 witness statement, the
10 portion of the Panel 10 witness statement by Mr. Clark,
11 Volume 2, Document No. 6, I will be referring to.

12 THE CHAIRMAN: Sorry, what was that last
13 one?

14 MR. HUNTER: Panel 10, witness statement.

15 THE CHAIRMAN: Yes.

16 MR. HUNTER: Volume 2 which constituted
17 Mr. Clark's evidence, if you recall Document No. 6, and
18 I will be referring to specific pages in that evidence.

19 The review under the Environmental
20 Assessment Act, Exhibit 5 - this is the letter from Mr.
21 Douglas to Mr. Krasnick - and I will be also referring,
22 sir, to the Panel 1 transcripts, the evidence of Mr.
23 Douglas and Mr. Monzon with respect to the reasons for
24 the changes made to the area of the undertaking.

25 THE CHAIRMAN: Some of these things

1 obviously you are aware we don't have in front of us.

2 MR. HUNTER: I appreciate, sir. I will
3 proceed very slowly through those. I will identify
4 them for you and the references to them will be very
5 specific and very detailed.

6 THE CHAIRMAN: Would it be preferable, I
7 think from the Board's point of view, if we could break
8 for 10 minutes and just have Ms. Devaul gather together
9 some of this stuff.

10 MR. HUNTER: Fine, I apologize.

11 THE CHAIRMAN: I think it's easier for us
12 to follow along if we had the material in front of us.

13 MR. HUNTER: Yes, sir.

14 MR. FREIDIN: And I'm just wondering if I
15 could, before we do that, obtain the volume numbers of
16 the transcripts that he's referring to and also perhaps
17 if there are any other parties who have additional
18 documents that they will be referring to, they can so
19 indicate now so we can do it all at once.

20 THE CHAIRMAN: All right.

21 MR. HUNTER: The transcript number is
22 Volume 7, Wednesday, May 18th. I dare not mention the
23 year.

24 THE CHAIRMAN: '88 or '89?

25 MR. HUNTER: '88, Mr. Chairman.

1 THE CHAIRMAN: Okay. Mr. Colborne, were
2 you going to be referring to anything other than those
3 documents already before us?

4 MR. COLBORNE: Mr. Chairman, I have a
5 book of authorities which I will provide. I'm also
6 going to be referring to the EA Document itself and --

7 THE CHAIRMAN: Exhibit 4.

8 MR. COLBORNE: Exhibit 4, and very
9 briefly to some of the other documents only in the
10 sense of what is in them as opposed to quoting a
11 passage. So if I could just proceed that way other
12 than try and direct you to find documents that you
13 won't actually have to read.

14 THE CHAIRMAN: All right. Any other
15 parties?

16 MR. FREIDIN: I would still like to have
17 the opportunity to note that because I may want to look
18 at them and see whether in fact I agree with the
19 characterizations of what they say.

20 THE CHAIRMAN: Mr. Colborne, could you
21 just list them, or put it this way: Could you give
22 them to Mr. Freidin during the break?

23 MR. COLBORNE: Yes.

24 THE CHAIRMAN: And you can gather them,
25 or any of the other counsel.

1 MR. COLBORNE: I will make a list right
2 now.

3 THE CHAIRMAN: Okay. Do any of the other
4 counsel have documents that they are going to be
5 referring to. Mr. Lindgren?

6 MR. LINDGREN: I do have copies of a
7 one-page regulation that I will be distributing at the
8 break.

9 THE CHAIRMAN: What is the regulation
10 number?

11 MR. LINDGREN: It's Ontario Regulation 8
12 of '80.

13 THE CHAIRMAN: 8...?

14 MR. LINDGREN: Of 1980.

15 THE CHAIRMAN: Very well. Perhaps we
16 will take 20 minutes at this time in order to gather
17 all of these together.

18 Thank you.

19 ---Recess taken at 9:30 a.m.

20 ---On resuming at 10:00 a.m.

21 MR. CHAIRMAN: Thank you. Be seated,
22 please.

23 Ladies and gentlemen, we don't have the
24 Crown Timber Act in front of us, but we understand a
25 copy is being obtained.

1 MS. BLASTORAH: I advised Ms. Devaul,
2 Mr. Chairman, that Exhibit 918 was the complete Act
3 which was an exhibit.

4 THE CHAIRMAN: All right. We might as
5 well proceed, Mr. Hunter.

6 MR. HUNTER: Thank you, Mr. Chairman.

7 If I might, Mr. Chairman, draw your
8 attention to Regulation 205/87, and if I could, I would
9 very briefly refer you to some of the critical
10 sections.

11 First, if I might, I draw your attention
12 to Section 5(1) of that regulation. And in that
13 particular provision you will find a list of
14 undertakings, which if so undertaken by a public body,
15 would be exempt from Section 5(1) of the Environmental
16 Assessment Act, meaning obviously that an environmental
17 assessment need not be prepared.

18 And those provisions - and I don't
19 intend, sir, to go through all of them - I think
20 reflect very specific, very detailed activities which
21 might be undertaken, and they are either qualified, in
22 my submission, by the fact that they are of a very
23 limited nature and, therefore, the Crown has taken or
24 made the conclusion that there would not be a serious
25 impact, or they are conditioned by the fact that such

1 issues would be dealt with under other pieces of
2 legislation, so that there was, in effect, a fall-back
3 position. But the main point is that those
4 undertakings are of a very limited and very detailed
5 kind.

6 Further, I would point out that that
7 provision applies only to those bodies that are
8 identified under Section 3 of the same regulation and
9 that the Ministry of Natural Resources is not present
10 or is not identified.

11 If we proceed over to Section 9, and for
12 the purposes of this part of my presentation I would
13 suggest to you that the wordings under Section 9 are of
14 a similar kind:

15 "The making of a loan, giving a grant,
16 giving a guarantee of debts or issuing or
17 granting a licence..."

18 It is my submission that that section of
19 the regulation should be read in a manner that is
20 consistent with the regulation as a whole and meaning
21 that a public body - not just necessarily MNR, if it
22 applies to MNR - is exempt in very limited and very
23 detailed circumstances from the requirement to prepare
24 an EA, and those circumstances would only be where a
25 licence or a grant is being issued. And I think, Mr.

1 Chairman, that will have some significance when we
2 review the motion as presented to you by the Ministry.

3 An interesting question, and I will
4 confess that I have not had time to research it - or
5 two interesting questions: First of all, is whether or
6 not --

7 THE CHAIRMAN: If I might interrupt,
8 Mr. Hunter.

9 Is the point you are trying to make with
10 your last few statements the fact that you don't feel
11 that Section 9 applies unless you are dealing with a
12 specific instance of a grant or a loan as opposed to a
13 regime where these things are done on a regular and
14 continuing basis?

15 MR. HUNTER: Exactly. And one has to
16 read all of these words conjunctively, particularly
17 with respect to the issuing of a licence, a permit,
18 approval, permission or consent. And my suggestion is
19 that the motion as prepared by the Ministry would seek
20 to exempt from your jurisdiction evidence with respect
21 to the "regime" -- the "decision-making regime" that
22 would affect all of those items including permissions
23 or consents which go to a much broader issue than the
24 simple giving of a licence.

25 THE CHAIRMAN: Okay. Just to clarify it

1 in my own mind. Are you making a distinction between
2 the granting of a loan or a licence and the planning
3 process which sets up the conditions under which a
4 grant or loan might be made?

5 MR. HUNTER: I am suggesting, sir, that
6 anything that would deal with the broad question, the
7 decision-making process and the terms and the
8 conditions for the giving of licences --

9 THE CHAIRMAN: As opposed to the actual
10 granting?

11 MR. HUNTER: The granting. And I believe
12 that Section 9 deals with the very specific question of
13 Mr. X, here is your licence. And that undertaking,
14 that very specific aspect of the allocation of a
15 benefit, if it can be so described, and that is all
16 that that section is intended to cover.

17 And I think, Mr. Chairman, perhaps I can
18 help you, when we get into the motion itself, and you
19 will see or I will argue that that motion contains
20 three very clearly distinct or can anticipate three
21 very clearly distinct regimes.

22 An interesting question in our view in
23 law - and I believe that Mr. Lindgren will deal with
24 this in more depth, therefore, I don't intend to spend
25 a great deal of time on it - is the issue related to

1 Section 10. And if I could draw your attention to that
2 before I go back to Section 9. And I read that
3 section, sir, and I had a lot of difficulty with it
4 because it seemed to me that common sense would say
5 that Section 9 and Section 10 had to be read together.

6 Mr. Lindgren has presented me with a
7 regulation which would support the wisdom to which I
8 fell into inadvertently, and I'm going to allow him to
9 speak to that. But I would suggest to you that Section
10 10 can reasonably be read in the following way, because
11 it makes sense in the context of the whole regulation:

12 "Notwithstanding any provision of this
13 regulation..." which can be read to be
14 read notwithstanding Section 9:

15 "which exempts inter alia the granting of
16 a licence where an environmental
17 assessment of an undertaking is
18 submitted..." and I emphasize that word
19 "submitted":

20 "...means that where that undertaking is
21 required to deal with the general issues
22 in a general sense..." that is the
23 nature of the issuing of consents or of permissions:

24 "...then the Act applies."

25 In other words, Section 10 is again a

1 fall-back provision which says that when you are
2 dealing with the general question of the granting of
3 licences, permits, approvals or consents, then the Act
4 applies.

5 And, in my submission, the class
6 assessment provides for - I mean, the class assessment
7 in the context of all of the evidence which has been
8 submitted which deals with the question of allocation -
9 provides for a general scheme, a general
10 decision-making scheme which deals with the general
11 questions of planning, the allocation of the resource
12 under the activities, the four activities, and the
13 impacts of such activities.

14 So therefore, Mr. Chairman, I would
15 suggest, firstly, that the motion as presented to you
16 by the Ministry cannot be legally grounded in Section
17 9, and I refer, sir, to the entirety of that motion,
18 firstly; and, secondly, that Section 9 should be read
19 conjunctively with Section 10 and which, in any event,
20 would require or could not exclude the question of
21 allocation from your jurisdiction.

22 MR. CHAIRMAN: Just going back for a
23 moment. Assuming for the purpose of argument that the
24 Board did have the jurisdiction to deal with the
25 decision-making process regarding allocations,

1 licencing, granting, et cetera.

2 MR. HUNTER: Meaning the terms and the
3 conditions of such, yes.

4 MR. CHAIRMAN: That's right. Are you
5 suggesting that the Board could only deal with that in
6 terms of the overall Class EA relating to the
7 decision-making process or that it would have the
8 further jurisdiction to deal with a specific grant,
9 allocation or licence?

10 MR. HUNTER: I am much more comfortable
11 with the former, meaning the general terms and
12 conditions affecting the allocation of the granting of
13 licences, permits, consents, et cetera.

14 MR. CHAIRMAN: In other words, setting
15 out what considerations should be taken into account
16 when allocating or granting licences as opposed to the
17 Board making a determination based on whatever evidence
18 may be adduced that in a specific management unit such
19 and such licence should be granted as a condition of
20 approval?

21 MR. HUNTER: Yes.

22 MR. CHAIRMAN: It's the former?

23 MR. HUNTER: That's correct, sir.

24 Now, there may be views to the contrary,
25 but I'm certainly arguing that this motion threatens

1 the first proposition that you have put forward.

2 I think, Mr. Chairman, I've covered the
3 major proposition, as I've indicated, which is that the
4 intent of Section 9, if it can be applied to the
5 Ministry of Natural Resources, would allow them to
6 carry on in an orderly and timely basis what I would
7 call the granting of a licence pursuant to Section 9,
8 without the need for an environmental assessment and
9 that that section ought to be read in that way.

10 If I might, I would go to the Crown
11 Timber Act, and my reference there is simply to
12 indicate to you that the word "licence" is referred to
13 in Chapter 109, Crown Timber Act, and Section 1(d), and
14 it's simply read, and we can all read it ourselves.
15 It simply says:

16 "A licence means a document heretofore or
17 hereafter granted that authorizes the
18 cutting of Crown timber and subject to
19 subsection 6(3) which deals with forest
20 management agreements, includes an
21 agreement entered into under subsection
22 1 of that section."

23 I should be more clear. Section sub (6)
24 sub (1) deals with the granting of agreements or the
25 establishment of agreements for the management of Crown

1 timber.

2 The point I wish to make here, sir: To
3 my knowledge, this must be -- or, in my opinion, this
4 must be the reference in the motion; that is, the
5 reference to licence here must be cross-referenced to
6 the Crown Timber Act. There is no reference in this
7 Act - and I'm subject to be corrected - to the words
8 consent, approval or permission. I have found nothing
9 which defines those words in the Crown Timber Act and,
10 therefore, I think prior to you - or if you could be
11 persuaded to accept this motion by the Ministry, one
12 must know with rigor what those words mean.

13 It seems to me that the phrase consent or
14 permission could virtually affect any aspect of the
15 decision-making process of the Ministry in their
16 planning process.

17 As I say I'm subject and would be quite
18 happy to be corrected, but I have found no other
19 definitions in the legislation which would give me any
20 comfort or sense as to what it is the Ministry is
21 talking about in very specific terms.

22 I won't be referring to the update, I
23 think Mr. Lindgren will be, and I'm trying to curtail
24 some of my comments because I know that my colleagues
25 will be referring to it, so I will try to cut down on

1 the repetition.

2 Sir, if I might, I would like to take you
3 to the motion itself. And without being overly
4 pedantic, I would like to take you through the words of
5 that motion and suggest to you, based upon the
6 arguments that I presented with respect to Section 9 of
7 the regulation, that there is no legal authority to
8 sustain this motion pursuant to Section 9 or pursuant
9 to the regulation.

10 The first point is: In the second line
11 and the third line you'll notice that the words are:
12 "To make any orders respecting loans, grants or
13 guarantees of debt." And if we go back to the wording
14 of Section 9, the words are: "The granting of a loan,
15 a grant or a guarantee."

16 And I suggest to you that the
17 generalization of the activity, the granting of loans
18 or of grants or of guarantees of debt in and of itself
19 is not substantiated on the basis of Section 9 because
20 of the arguments that I have previously given to you.

21 The phrase "or the issuance or granting
22 of a licence, permit, approval, permission or consent,"
23 might be covered by the words in the regulation, but I
24 would suggest to you that those activities are
25 qualified, and substantially qualified by the following

1 two clauses, meaning that "the issuance of a licence,
2 permit, approval" is linked to the phrase "or to make
3 orders respecting the administration or structure of
4 the current licensing schemes for the undertaking of
5 timber management."

6 And I draw your attention to those words
7 because I believe that the intent of the MNR motion is
8 to preclude your jurisdiction from dealing exactly with
9 those issues that we discussed before, meaning the
10 terms and the conditions which would affect the
11 administration or structure of the current licensing
12 scheme with respect to the allocation of timber
13 resources. And I believe you do have that
14 jurisdiction.

15 So while I would be prepared to concede
16 that, in part, the first part of this motion can from a
17 legal basis be considered by yourself; that is,
18 considered in the sense of precluding your own
19 jurisdiction, sir, I am strongly of the view that your
20 jurisdiction cannot be fettered with respect to the
21 latter part.

22 MR. CHAIRMAN: Is that the case, Mr.
23 Hunter, using your own arguments, if you read in
24 Section 10?

25 MR. HUNTER: No, sir. I believe that

1 Section 10 precludes this Section 9 from having any
2 effect.

3 MR. CHAIRMAN: That is what I mean.

4 MR. HUNTER: That's correct, sir. But
5 I'm saying if you don't accept that argument; that is,
6 that Section 10 precludes Section 9 from applying, my
7 argument then is you can only apply and should only
8 apply Section 9 as the legal basis for this motion in a
9 very limited way.

10 THE. CHAIRMAN: i.e., a specific grant or
11 a specific allocation?

12 MR. HUNTER: That is correct, sir.

13 THE CHAIRMAN: Okay. Could you just hold
14 on for a second, I just want to get some notes.

15 MR. HUNTER: Thank you, Mr. Chairman.

16 If I might, I would like to draw your
17 attention to the last phrase which, in terms of the
18 intent of this motion, I feel is an unwarranted,
19 unnecessary challenge to my clients. It says:

20 "... or to deal with issues concerning
21 entitlement to or allocation of the
22 benefits of the timber resource."

23 Let me put my proposition to you very
24 clearly. I believe that phrase is not only not
25 supported by Section 9 of the regulation, but that to

1 seek to fetter your jurisdiction with respect to those
2 matters that might be reasonably contemplated as coming
3 within that phrase would strike at the very heart of
4 your jurisdiction and the very heart of the purposes to
5 why we are at this hearing.

6 THE CHAIRMAN: Okay. I understand that
7 you will be elaborating perhaps on that question.

8 Are you making any differentiation with
9 respect to whether or not the Board has any
10 jurisdiction to determine entitlement with respect to
11 native populations which may be of a different nature
12 than the entitlement of any other segment of the
13 population?

14 In other words, I would like you to
15 define in terms of that sentence and your proposition
16 that you just put forward, as to what the effect of
17 restricting the Board's jurisdiction in that area might
18 be vis-a-vis your client with respect to any question
19 concerning a right that your clients may claim to have
20 in priority over anyone else? And, again, we are into
21 into treaty-type issues.

22 And if what you are saying, and I
23 understand you to say, is that this Board should have
24 the jurisdiction to determine issues concerning
25 entitlement or allocation of benefits of the timber

1 resource not only for your clients but for other
2 parties to this proceeding, I want to make sure that
3 you are not, within that, trying to put forward that
4 your clients may have superior rights to other parties
5 to this proceeding which would entail the Board perhaps
6 having to get into the question of determining
7 aboriginal and treaty rights.

8 MR. HUNTER: If the words "entitlement
9 to" were struck from this motion that would cause me no
10 concern. In other words, it is not of concern to my
11 client, in fact I think I've stated, Mr. Chairman, two
12 years ago that we do not wish to deal with "treaty
13 rights" before this Board. We do not want this Board
14 to make determinations based upon the legal character
15 of those treaties, those will be determined in the
16 courts in this province.

17 We do think that this Board should be
18 mindful of and aware of the fact that there are things
19 called treaty rights and you have heard evidence from
20 MNR witnesses with respect to their - I'll put it at a
21 most neutral level - their concerns about that subject,
22 and you have heard evidence presented by the Ministry
23 with respect to those issues.

24 We will attempt to provide you with a
25 different view of the treaties, but the relationship

1 between that treaty right as "an entitlement" and your
2 jurisdiction to say: "Here is a specific piece of land
3 that you should have", or: "Here are the terms and
4 conditions of a particular piece of land", is not an
5 issue for us.

6 What is an issue, though, falls under the
7 phrase "allocation of the benefits", because we believe
8 that the Ministry of Natural Resources itself has led
9 evidence with respect to those issues. We don't agree
10 with all of it and we believe that this Board has full
11 jurisdiction to deal with questions of allocation of
12 benefits to the timber resource to any population in
13 this province, including my clients.

14 The difference is that the socio and
15 economic and cultural needs of those communities are so
16 substantially different from the non-native community
17 that MNR ought to be required to not only address those
18 concerns but to meet those concerns through allocation,
19 and I am using the word allocation here in the broadest
20 sense.

21 I'm not sure, sir, that I can make it any
22 clearer without getting into the nature of the evidence
23 that we are going to try to present to you.

24 THE CHAIRMAN: I just wanted to make it
25 quite clear, using the word entitlement as it was used

1 there, that we were not going into the situation where
2 you are requesting this Board to determine its
3 jurisdiction to deal with entitlement in the
4 treaty/aboriginal right sense.

5 MR. HUNTER: No, sir.

6 THE CHAIRMAN: Because this is something
7 we sort of went into earlier and we basically came to
8 the conclusion that it was not within the Board's
9 jurisdiction to determine those issues.

10 MR. HUNTER: No, sir, but my concern is
11 not with that, my concern is the normal understood
12 everyday usage to which entitlement might be made in
13 the context of the application of any of the
14 legislation in northern Ontario. When one grants a
15 licence one grants, or is giving, or could be
16 interpreted to be giving an entitlement to do
17 something.

18 THE CHAIRMAN: Yes, but that entitlement
19 may be no different for any other segment of the
20 community. That's the point.

21 MR. HUNTER: That's correct.

22 THE CHAIRMAN: I just want to make sure
23 that we are not singling out the native community for a
24 different type of entitlement which is what you are
25 asking the Board to consider to be within its

1 jurisdiction. The impacts may be different...

2 MR. HUNTER: The impacts are different,
3 but, again, I want to be very careful, if the word
4 entitlement as understood is dealing with the very,
5 very limited issue of an entitlement pursuant to a
6 treaty right, that is not a matter which we wish
7 personally to discuss with you in this Board.

8 Now, there may be others with different
9 views. If, however, there is any suggestion that the
10 word entitlement could be given a broader definition,
11 then we would have to say: No, we want you to deal
12 with the issue of entitlement. If you are going to
13 accept this motion -- let me put it the other way: If
14 you were to accept this motion, then I would think you
15 would have to put very strong terms -- you would have
16 to have a very clear definition of what entitlement is.

17 THE CHAIRMAN: Okay.

18 MR. HUNTER: Perhaps I might just put on
19 the record or address that very issue. The way that we
20 have approached entitlement, sir, is to simply say that
21 if you are persuaded by the Ministry to accept the last
22 clause, then I believe that you must also then
23 establish or put into place very strong definitions
24 which would define entitlement. And, again, I draw
25 your attention to the language of the motion or to deal

1 with issues concerning entitlement. I don't know what
2 that means.

3 If you are to accept that, sir, then you
4 must -- I would urge you link that phrase directly into
5 the requirements of Section 9 of this regulation if you
6 believe it applies, and I don't believe that your
7 jurisdiction can be fettered one inch beyond that. I'm
8 not even sure I accept the fettering in any
9 circumstance.

10 But if the Ministry is asking you to take
11 those phrases and give them an undefined, ununderstood
12 meaning as a vehicle to fetter your discretion and to
13 prohibit evidence from going in and to have a fight
14 over the next year, I don't believe, sir, that you can
15 do that. And that is what I think this Ministry is
16 attempting to do, because those words are so ambiguous
17 so clearly and could be so clearly put to any test that
18 our energy and our efforts could lead to nothing but
19 frustration before this Board.

20 I was being somewhat facetious, sir, when
21 I said that the phrase entitlement could only be linked
22 to the Crown Timber Act. It is not our intent to link
23 it to any legal understanding or ask you to give any
24 legal definitions with respect to that phrase in
25 relationship to treaty rights, that is on one hand; on

1 the other hand, I would urge you to reject the motion
2 because in the absence of a definition I believe that
3 phrase can be again interpreted in a very broad and
4 very ambiguous way.

5 I would like to turn lastly to the phrase
6 or the allocations of the benefits of the timber
7 resource, and I must say to you that I don't understand
8 what those words mean. My understanding of my purpose
9 here was to address the issue of the activities, the
10 undertaking, the four activities and to address whether
11 or not we felt, believed that the terms and conditions
12 proposed by the Ministry would meet the needs of my
13 clients in terms of the impacts on their interest with
14 respect to those activities.

15 What I would like to do is simply take
16 you through or point out to you some of the evidence
17 which is presented by the Ministry in terms of, for
18 example, the phrase "allocation of", the definitions of
19 that word and how they have been referred to in the
20 materials and put to you that the use of that word
21 again is so ambiguous and is so broad that it would
22 affect substantive parts of the evidence as presented
23 to you by the Ministry and that you must read that
24 phrase as an attempt to preclude your jurisdiction from
25 in fact dealing with evidence that has been presented

1 to you. It may not be that the Ministry intended that,
2 but that is not good enough, because the words as
3 presented in that motion could lead to a reasonable
4 interpretation of that consequence.

5 The first reference I make, Mr. Chairman,
6 is to page 168 of the Timber Planning Manual and all I
7 intend to do, sir, is indicate to you that throughout
8 the Timber Management Planning Manual that the word
9 allocation is used repeatedly and the definition at
10 168. Allocation: The designation of forest estate
11 areas for specific treatments such as depletion, forest
12 renewal and forest maintenance. Obviously some of the
13 activities pursuant to the undertaking.

14 That same phrase, sir, is used - and I'm
15 only quoting some examples - at page 11 at 2.4.7.

16 MR. FREIDIN: Sorry, can you give me that
17 again?

18 MR. HUNTER: Page 11.

19 MR. FREIDIN: Of the TPM?

20 MR. HUNTER: Determination of Allocation.

21 The process of allocation of areas for operations is
22 broken down into three steps. First, the criteria
23 which will guide the allocation of areas for operations
24 must be established; second, all areas which meet the
25 criteria for allocation during the 20-year period of

1 the plan must be identified; third, areas for operation
2 during the five-year term of the plan are selected from
3 those meeting the criteria for allocation.

4 The fundamental aspect of this hearing,
5 Mr. Chairman, is your jurisdiction to determine and
6 establish terms and conditions with respect to
7 allocation in order that environmental considerations
8 and the environment as defined under the Environmental
9 Assessment Act are met.

10 I read this motion to say that you can't
11 do that. And again I repeat: It may not have been
12 intended by the Ministry, but that doesn't matter. So
13 Mr. Freidin's words which say that your jurisdiction is
14 not limited when you are dealing with environmental
15 matters may be kind words but they are meaningless in
16 the context of this particular motion.

17 If Mr. Freidin wishes to limit your
18 jurisdiction to very tightly controlled and defined
19 circumstances; i.e., the giving of a grant, then let
20 this motion reflect that and that can be argued, but
21 not this.

22 Further reference, Mr. Chairman, can be
23 found at page 77 at 4.11 and at page 78 at 4.11.14 and
24 page 85 at 4.11.15, 4.18.12.

25 And again, Mr. Chairman, I will not take

1 your time to go through all of those in detail.

2 The other document I would refer to is
3 the evidence of Mr. Crystal in his report on Treaty and
4 Aboriginal Rights.

5 MR. FREIDIN: One moment, please.

6 THE CHAIRMAN: What page is that?

7 MR. HUNTER: I apologize, Mr. Chairman, I
8 don't have the -- 164 in Panel 6, I believe.

9 THE CHAIRMAN: Thank you.

10 MR. HUNTER: And if I might, Mr.
11 Chairman, I would draw your attention to three
12 statements that are made, the first being on 1776, the
13 other which commences at the bottom.

14 And I recognize, sir, that this refers to
15 wildlife, but it is stated that:

16 "MNR recognizes obligations under Indian
17 treaties and in allocating such resources
18 gives primary consideration..." and the
19 phrase is important:

20 "...subsistence use by native people."

21 Secondly, at page 179 at the bottom,
22 again it is stated that it is government policy that:

23 "The Province of Ontario are committed to
24 effective consultation with Indian bands
25 concerning resource development on land

1 adjacent to Indian reserves where such
2 development has the potential for
3 significant impact on the band."

4 And again, sir, at page 180 in the middle
5 paragraph and here, sir, is a clear issue of
6 "entitlement":

7 "Apart from the issue of Indian land
8 claims, Ontario is prepared, the
9 Province of Ontario is prepared in
10 conjunction with the federal government
11 to make Crown Ontario land available to
12 NAN communities to meet community needs
13 including economic needs."

14 It is our view, sir, whether or not we
15 agree with the particular merits in part or in total of
16 Ontario policy to say to you the Province of Ontario
17 has policies in place which are presumably there to
18 meet the resource needs and the economic needs of those
19 communities. We view this paragraph, this phrase as
20 clearly threatening that commitment.

21 We are here to deal with the fundamental
22 questions of the allocation of the benefits of the
23 timber resource to native communities, just as the
24 forest industry is here to deal with the same issue
25 from their perspective.

1 I will make one more reference, sir, to
2 this issue of allocation of benefits -- sorry, two
3 more. The first, again, is in the letter from Mr.
4 Douglas to Mr. Krasnick in Exhibit 5 and in that letter
5 the Ministry --

6 MR. FREIDIN: Page 242.

7 MR. HUNTER: I'm going to go to a theme
8 here, sir, which I believe is very crucial, page 244,
9 and I'm referring in this instance, Members of the
10 Panel, to only one of the statements made by Mr.
11 Douglas in this letter, and I'm going to exact words or
12 to words which I think can be reasonably and without
13 too much argument linked to the motion.

14 Under harvest, which is clearly one of
15 the activities under the area of the undertaking, No.
16 2:

17 "The economic benefits which accrue to
18 those employed in harvest activities
19 would also be realized by native people
20 and some native communities who engage in
21 logging".

22 Why on one hand does the Ministry say
23 that these are matters clearly not only within the
24 jurisdiction of the Board but matters which they
25 themselves are going to presumably address on one hand

1 and, on the other hand, propose to you that your
2 jurisdiction is fettered with respect to the
3 allocations of benefits of the timber resource. I
4 don't understand the motion; I also don't believe in
5 the tooth fairy.

6 The last reference I would make with
7 respect to that issue, sir, is found in the evidence of
8 Mr. Clark which is Panel 10 witness statement
9 identified, sir, as Document No. 6, and again I'm
10 afraid I don't have a page number. Perhaps if I can...

11 THE CHAIRMAN: 944.

12 MR. HUNTER: Thank you, sir. And, again,
13 I restrict the references, and if I draw you to the
14 tables you may - again, I'm not going to go into the
15 transcripts of Mr. Clark's evidence or my
16 cross-examination of him, but I will simply point to
17 the evidence as presented. In Table 5 under
18 socio-economic environmental impacts the phrase:

19 "This may result in a redistribution of
20 benefits (e.g., road accessible lodges
21 and facilities) and may ultimately lead
22 to a reduction in the moose population at
23 the local level."

24 Clearly a matter which affects my
25 clients, Mr. Colborne's clients, Mr. Edwards' clients.

1 MR. FREIDIN: I am sorry, what page would
2 we find that at?

3 THE CHAIRMAN: 967 I believe at the
4 bottom.

5 MR. FREIDIN: Reference is to the first
6 bullet point, Mr. Hunter?

7 MR. HUNTER: No, the reference is to the
8 last bullet point under short-term.

9 Mr. Chairman, I'm being excessively
10 pedantic. We scanned this information only in
11 relationship to the word benefit, not in relationship
12 to the word impact, not in relationship to the word
13 effect which I think, if one were to argue it and have
14 a thesaurus might have roughly the same definition.

15 I then go to Table 6, page 971, and again
16 the same issue arises, the same point arises,
17 redistribution of benefits. Well, I don't find much of
18 a difference between the word redistribution of
19 benefits and allocation of benefits and, again, I'm at
20 a loss to really understand what it is that the
21 Ministry wants to do.

22 Table 25 and again the same issue with:
23 "under the area of anglers, stakeholders, anglers, user
24 conflicts", and the same concept is introduced by Mr.
25 Clark dealing with: "the redistribution of benefits"

1 which is found in the third bullet in the first line of
2 the table under potential socio-economic environmental
3 effect.

4 And one more, Mr. Chairman - and I'm not
5 entirely happy with this because it was simply a
6 question of time permitting us to scan the data even
7 further - but under Table 32, Wood Supply, the same
8 issue is addressed by Mr. Douglas in his evidence:

9 "Timber harvesting operations can supply
10 wood to processing facilities (e.g.,
11 sawmills) in native communities."

12 And the one above:

13 "Timbering harvest operations in the
14 vicinity of native communities can
15 provide potential job opportunities and
16 income associated with bush and mill
17 operations."

18 This is Table 32, page 1032, the first
19 two bullets.

20 Without belabouring the obvious or
21 hacking my way through an open door, the Ministry has
22 clearly presented evidence with respect to issues
23 related to the redistribution of benefits, I think it's
24 not unfair to say the allocation of benefits, and we
25 clearly feel that your jurisdiction ought not, under

1 any circumstances, be fettered.

2 If I might, there is one more comment and
3 this goes to the issues related to the area of the
4 undertaking.

5 As you are aware, Mr. Chairman, the area
6 of the undertaking as defined under the Class EA is
7 found at Part I, The Undertaking, page 11 at lines 1
8 through to 3 -- sorry, that doesn't define the area of
9 the undertaking.

10 Area of the undertaking is defined at
11 Figure 3.2.1, which is roughly the 50th parallel, I
12 believe, and the Albany River. You may recall, sir,
13 that in the original undertaking as provided by the
14 Ministry the area of the undertaking was further north
15 than that line.

16 THE CHAIRMAN: Sorry, what page are you
17 on?

18 MR. HUNTER: Page 11, sir. The Ministry
19 is proposing in this document and they have proposed in
20 their terms and the conditions that at a subsequent
21 point in time the terms and the conditions that you
22 establish in this hearing could apply north of 50. And
23 you may recall, sir, that we cross-examined Mr. Monzon
24 and Mr. Douglas extensively on that issue in Panel 1,
25 which was a long, long time ago. The issue was raised

1 with Mr. Monzon and Mr. Douglas as to why the border or
2 the area of the undertaking had been changed. And if I
3 can refer to that document at page 1217I, and I will go
4 to your statement, sir:

5 "So am I to understand from what you are
6 saying, Mr. Douglas, is that the Ministry
7 in order to make this timber available
8 quickly for native persons, peoples for
9 community purposes decided to take..."

10 whatever, and the answer was yes.

11 Then the issue was raised as to why that
12 was being done, and both Mr. Douglas and Mr. Monzon
13 stated that it was the intent, and I think I can use
14 that word, of the Ministry to ensure -- quote at page
15 1213:

16 "...together with that fact is the fact
17 that one of the things we were concerned
18 about with respect to northern
19 Ontario..." this is the evidence of Mr.
20 Monzon, sir:

21 "...was the available supply of timber
22 for native people in the various
23 communities and we wanted to ensure that
24 there was not an onerous process that we
25 or the native people would have to go

1 through in making that timber available."

2 I suggest to you, sir, we are caught here
3 in a catch-22. Clearly the position of my client will
4 be that you ought not to allow a term and condition or
5 grant a term and condition which would allow MNR to
6 apply this Class Assessment north of 50 on one hand.
7 And our reasons today for that position are more
8 compelling than they were when this hearing started.

9 The Ministry is now saying you ought not
10 to have the jurisdiction to deal with the issue of
11 licensing on one hand and, on the other hand, through
12 their own evidence they say we want a different scheme
13 north of 50, whatever that scheme may be.

14 I can't believe that this Board would
15 impose upon the northern communities a scheme for the
16 distribution of timber resources or the allocation of
17 benefits thereto without their participation in the
18 design and establishment of that particular policy.
19 And for that reason alone, sir, I think you ought to
20 reject this motion.

21 THE CHAIRMAN: If the Board rejected the
22 motion and the native communities had input with
23 respect to allocation matters, would your same
24 objection as to whether or not a decision with respect
25 to this undertaking apply or not apply north of 50; is

1 that what you're saying?

2 MR. HUNTER: Yes, sir. At this time,
3 yes, but even more so today. I mean, we had tremendous
4 reservations about the application of this application
5 north of 50, we had great concerns because the majority
6 of the communities north of 50 have not substantially
7 participated in this hearing.

8 THE CHAIRMAN: So they are different
9 communities and they aren't really taking part in the
10 design.

11 MR. HUNTER: That's correct.

12 THE CHAIRMAN: Any such allocation
13 process in terms --

14 MR. HUNTER: Because we haven't dealt
15 with that issue and we don't intend -- Mr. Freidin, let
16 me finish.

17 And that is not an issue that we were per
18 se going to be addressing because we were going to be
19 dealing with the allocation of benefits in the
20 broadest, not with systems of distribution in terms of
21 licensing or granting which are fundamentally different
22 than the giving of a licence or of a grant, which is
23 what is going to have to be required in terms of any
24 development of a system north of 50.

25 THE CHAIRMAN: Okay. Mr. Hunter, could

1 you just expand a little bit on what you consider to be
2 the difference, presuming that the Board had
3 jurisdiction to deal with the decision-making process
4 concerning allocation as opposed to dealing with any
5 specific allocations with respect to any specific
6 management units; in other words, you might bring
7 evidence to raise the concerns about the fact, for
8 example, that native communities haven't received their
9 fair share of the allocations in terms of the
10 decision-making scheme for the planning process that is
11 in effect or is before the Board for approval.

12 Will you be dealing with it in terms of
13 your own evidence as to how those decisions should be
14 made as opposed to what those specific decisions should
15 be?

16 How would we deal with it, presuming we
17 had the jurisdiction, that is what I'm saying?

18 MR. HUNTER: To deal with those issues?

19 THE CHAIRMAN: Yes.

20 MR. HUNTER: I'm at somewhat of a loss to
21 answer that, sir, because it would require an ability
22 to go into the mechanism of the Crown Timber Act and
23 propose to you a series of amendments or changes to
24 that particular piece of legislation which would affect
25 matters north of 50.

1 Let me back up. The management scheme,
2 as I understand it, which affects the licensing
3 aspects, the granting of the licence, is predominantly
4 found under the Crown Timber Act. Your determination,
5 I think, can affect the general terms and the
6 conditions with respect to how licences, and I want to
7 be very careful here. It's not just the word licences
8 that causes me a great deal of concern, it's all of the
9 other words that are attached in that motion, but if we
10 can focus on the word licence.

11 Your jurisdiction, I believe, is to
12 establish the general terms and the conditions for the
13 granting of "licences within the area of the
14 undertaking", taking into consideration the Act and the
15 definition of the undertaking as proposed by MNR with
16 clear reference to environmental impacts. No different
17 from what Mr. Friedin said.

18 THE CHAIRMAN: Which Act are you talking
19 about, the Environmental --

20 MR. HUNTER: The Environmental Assessment
21 Act, yes.

22 Those terms and conditions will affect -
23 and I can't argue today how it will affect - the nature
24 of the administration by the Ministry of Natural
25 Resources pursuant to its responsibilities under the

1 Crown Timber Act, which lays out a regime for the
2 giving of licences.

3 THE CHAIRMAN: What would the position be
4 if the Board's decision was in conflict with the Crown
5 Timber Act, or can it be, in your submission?

6 In other words, if there is a regime set
7 out in the Crown Timber Act that specifies the way in
8 which these licences shall be granted but the Board
9 feels pursuant to the Environmental Assessment Act that
10 to do so would create an unacceptable environmental
11 impact, what is the Board's choice in that case?

12 MR. HUNTER: I would think that my first
13 response to that is that you would be bound by the
14 Crown Timber Act in terms of the granting of a licence.
15 Beyond that I think it becomes very ambiguous, but I
16 think there are some constraints on you. I think that
17 is a very real problem.

18 But to draw it to the issue that I'm -
19 well, I'm concerned about that but I'm also concerned
20 about another issue. You asked what would we do north
21 of 50. In order for there to be effective timber
22 management planning and allocation of resources and
23 benefits north of 50, I believe there will have to be
24 an amendment or amendments to the Crown Timber Act, and
25 that is the problem, because if you were to apply or to

1 allow a term and condition which would simply allow for
2 the rollover --

3 THE CHAIRMAN: No, but that is presuming
4 that the Board would agree with a submission that any
5 approval within the area of the undertaking should also
6 apply north of 50.

7 MR. HUNTER: I believe, sir, that is what
8 I'm addressing. If you were to do that without
9 allowing evidence on matters that are dealt with under
10 the Crown Timber Act, you could not deal with
11 effectively the development of a system for, in the
12 broadest sense "the allocation of benefits" north of 50
13 including the giving of specific grants.

14 THE CHAIRMAN: But isn't it a rather
15 large heap of faith to assume that any decision of this
16 Board would apply outside of the area of the
17 undertaking in any event?

18 MR. HUNTER: We are hoping that -- yes,
19 I'm hoping that that will be the view of the Board.

20 THE CHAIRMAN: Since that defines what
21 constitutes the EA before the Board, it's defined by a
22 geographic limit.

23 MR. HUNTER: Yes.

24 THE CHAIRMAN: And presumably any
25 decision of this Board would have application within

1 the area of the undertaking--

2 MR. HUNTER: Yes.

3 THE CHAIRMAN: --and not necessarily
4 outside the area.

5 MR. HUNTER: And we would be seeking to
6 persuade you to adopt that view, sir.

7 THE CHAIRMAN: So your concerns north of
8 50 may be not unfounded but it may not be a concern at
9 this point?

10 MR. HUNTER: It's not a concern, sir, if
11 this Board adopts the view that this Class EA shall
12 only apply within the area of the undertaking, yes.

13 If, however, you are of the view that it
14 could apply north of 50 because you would accept the
15 amending proposal put forward by MNR, then we have a
16 very, very serious problem because given the evidence
17 of MNR itself, they are saying: Let's have a better
18 mousetrap north of 50, or a different mousetrap north
19 of 50, again putting it in neutral terms. We are
20 saying: Fine, now what should that mousetrap be?

21 MR. FREIDIN: Mr. Chairman, I have to
22 rise. I don't see what this has got to do with my
23 Notice of Motion. Panel 17 is going to address the
24 very issue which is being dealt with now, and that is
25 whether in fact the approval -- the amendment process

1 should allow the area of the undertaking to be extended
2 as suggested in term and condition, 55.

3 There is going to be evidence on that and
4 there is going to be a difference of opinion on that,
5 but why don't we wait and hear the evidence and deal
6 with the evidence in cross-examination and deal with it
7 in his case and deal with that issue on
8 cross-examination.

9 MR. HUNTER: Well -- sorry, Mr. Chairman.

10 THE CHAIRMAN: Because, Mr. Freidin, we
11 are in the midst of the argument on this motion and
12 seeing how the Crown Timber Act impinges upon what you
13 are asking the Board to rule upon and if, in fact, as a
14 result of the arguments put forward in Panel 17, the
15 amendment process would allow application of the
16 decision beyond the area of the undertaking by
17 extending the area of the undertaking, it may have
18 relevance, as Mr. Hunter has indicated. We don't want
19 to have to revisit this motion after 17 as well.

20 Is that not the gist?

21 MR. HUNTER: Thank you, Mr. Chairman.

22 I won't go over it again, yes.

23 I have no further comments, sir. If you
24 have any questions.

25 Thank you.

1 THE CHAIRMAN: Thank you.

2 Who wants to go next? Mr. Colborne?

3 MR. COLBORNE: Yes, sir, but may I have a
4 brief recess? Mr. Hunter covered some topics that I
5 will want to delete from my notes. Just five minutes
6 or less.

7 THE CHAIRMAN: Okay. Why don't we break
8 for 10 minutes then, please.

9 ---Recess taken at 11:08 a.m.

10 ---On resuming at 11:31 a.m.

11 THE CHAIRMAN: Thank you. Be seated,
12 please.

13 Could we get some sense, Mr. Colborne, of
14 how long we are going to be with the various parties?
15 How long do you intend to be?

16 MR. COLBORNE: About one hour.

17 THE CHAIRMAN: One hour. Mr. Lindgren?

18 MR. LINDGREN: Approximately 20 to 30
19 minutes.

20 THE CHAIRMAN: Mr. Cassidy?

21 MR. CASSIDY: Subject to questions from
22 the Board, five minutes.

23 THE CHAIRMAN: Ms. Seaborn?

24 MS. SEABORN: 15 to 20 minutes.

25 THE CHAIRMAN: And how about reply, Mr.

1 Freidin? You have no idea, I suppose.

2 MR. FREIDIN: So far about 20 minutes.

3 THE CHAIRMAN: Okay. Well, the way it
4 looks we'll probably be spending part of the afternoon
5 anyways on this motion. We have gotten an indication
6 from the court reporters that they could have a copy of
7 this transcript to us by early tomorrow morning. We
8 would probably proceed with the direct examination of
9 Panel 17 and would endeavor to render a ruling on this
10 motion as expeditiously as possible, hopefully this
11 week, so that it will indicate to parties the area
12 which is proper for the cross-examinations.

13 You know, it's one of these motions that
14 I think we have to dispose of before we get into the
15 cross-examinations in view of what has been raised. So
16 that is how we see it at the moment.

17 We do not want to attempt to render a
18 decision on this motion after listening to everybody
19 without having the transcript of the oral argument and
20 submissions put before us. But we should have that in
21 our hands by tomorrow morning.

22 Very well. Mr. Colborne?

23 MR. COLBORNE: Thank you, Mr. Chairman.

24 When I arrived here today I did not
25 intend to begin my submissions with a point that has to

1 do with the form of the motion because I did not
2 anticipate what Mr. Freidin would say about it and, in
3 particular, I do not anticipate - although I must
4 confess I suspected it - I did not anticipate or I was
5 not clear that what Mr. Freidin was here to do was to
6 seek a bulk order against a lot of the evidence that I
7 have been saying since day one I intended to bring.

8 Therefore, I feel compelled to refer you
9 to Section 23(6) of the Rules of Practice and Procedure
10 before this Board. It's very, very brief and it's very
11 clear.

12 "The Notice of Motion shall set out
13 clearly the relief requested and shall
14 include all supporting materials
15 together with an indication of
16 any oral evidence sought to be
17 presented."

18 My submission is that the Notice of
19 Motion does not set out clearly what Mr. Freidin stood
20 up this morning and said he was intending to get at.
21 And, for that reason alone, I submit that you should
22 simply reject the motion, presumably - if you believe
23 that there is substance to the issue, and I think you
24 do, and I think there is substance to it as well -
25 presumably without prejudice to him, to draft another

1 one that sets out exactly what he wants and bring it
2 before this Board with proper notice to the parties -
3 I got mine just before Christmas, I think the direction
4 was that it was to be out before that - so it can be
5 properly argued.

6 I do not want my client's case to be
7 determined in the context of establishing what kind of
8 cross-examination is proper with respect to one panel,
9 the last panel, as the proponent's evidence. I think
10 it's just unfair, and I could have been on notice of
11 this if Mr. Freidin had said in his motion what he
12 wanted.

13 So that is my first request. And, as I
14 said, I didn't arrive here today, so therefore I do
15 have some substantive submissions.

16 MRS. KOVEN: Excuse me, Mr. Colborne.
17 Are you saying you thought the context in which the
18 motion was worded before Christmas applied only to your
19 cross-examination of Panel 17 or it had nothing to do
20 with it?

21 MR. COLBORNE: Oh, it arose in that
22 context. On November 28th Mr. Freidin stood up and
23 said - and this was at the scoping session for Panel
24 17 - and said he had a problem and he defined it and
25 there was some discussion of it. So I'm not saying

1 that there was not the basis for thinking that he had a
2 much larger issue in mind at that time, but that is the
3 context where it arose.

4 My submission right now though has to do
5 with the form of the motion. This is a purely formal
6 submission. I say it does not conform with the rule.
7 Given the seriousness of what he is asking for, he
8 should have set out with great clarity and should have
9 given ample notice of exactly what he was asking for,
10 and he didn't. That's my initial submission.

11 THE CHAIRMAN: Well, Mr. Colborne, the
12 form of the motion was out prior to Christmas. You
13 know, if you had a problem at that time with the form,
14 that could have been communicated as well.

15 MR. COLBORNE: It could have been
16 communicated but, Mr. Chairman, how many layers of
17 motions and pre-motions and so on do we have here,
18 surely?

19 THE CHAIRMAN: Well, this is the whole
20 point. I think the Board wants to hear substantive
21 argument on the issues raised in this motion, and
22 albeit the context was in terms of the
23 cross-examination of Panel 17, but we have heard from
24 Mr. Hunter this morning the concerns of his client with
25 respect to the ramifications of his client adducing

1 their own evidence later on. I think the Board wants
2 to preclude issues regarding the form so that we can
3 dispose of this motion appropriately without further
4 delay.

5 We are facing Panel 17. They are ready
6 to go and we want to be able to make a ruling with
7 respect to the cross-examinations vis-a-vis Panel 17,
8 but also with respect to the larger question, which I
9 think can be deduced from the form of this motion in
10 its present form.

11 MR. COLBORNE: Well, is that your ruling
12 on my initial submission?

13 THE CHAIRMAN: Excuse us one moment.
14 ---Discussion off the record

15 THE CHAIRMAN: Mr. Colborne, are you
16 indicating that you are not prepared to deal
17 substantively with the issues raised in this motion?

18 MR. COLBORNE: No. I am saying that my
19 submission now is purely a formal one. I do have some
20 substantive submissions to make, but I did not know
21 that, as I phrased it a minute ago, that Mr. Freidin
22 was going to stand up and say: I interpret this motion
23 as being one which would in effect wholesale prohibit a
24 large area of evidence that some of the parties -
25 meaning me among others - have already said they are

1 going to bring.

2 THE CHAIRMAN: All right. But you are
3 prepared to deal with that issue; are you not, from the
4 perspective of your client?

5 MR. COLBORNE: I'm prepared to make
6 submissions on the substantive question, yes.

7 THE CHAIRMAN: All right. On that basis
8 I think the Board will rule that notwithstanding that
9 this motion could have contained more particularity as
10 to the larger issues, nevertheless, the issues are
11 properly before the Board and the parties appear to be
12 able to appropriately deal with them.

13 So I think we'll proceed at this point
14 with the substantive arguments.

15 MR. COLBORNE: Two points, Mr. Chairman.
16 I don't know about other parties obviously; and,
17 secondly, I would suggest that it may be that you could
18 rule on this motion insofar as the cross-examination is
19 concerned without having to rule on the broader aspects
20 of the motion.

21 THE CHAIRMAN: Well, in our view, Mr.
22 Colborne, it doesn't serve any useful purpose for us to
23 just restrict our ruling to the cross-examinations.

24 MR. COLBORNE: Well, Mr. Chairman, you
25 have not heard my submissions on that point yet. Is

1 that a ruling?

2 THE CHAIRMAN: No. What we are saying
3 is, we would like to hear the submissions on the
4 substantive issues and in the broader context as well.
5 You are going to give us submissions with respect to
6 the scope of the cross-examinations, I presume; and,
7 secondly, this motion raises the larger issues as to
8 whether or not certain things should be precluded from
9 the scope of this hearing vis-a-vis parties when they
10 adduce their own evidence later on. I think we want to
11 deal with that as well, your submissions on that.

12 MR. COLBORNE: The test of whether a
13 particular point may be proper for cross-examination
14 and whether the same point might be proper as evidence
15 to be heard by the Board, for instance, or maybe a
16 point that is within the jurisdiction of the Board are
17 not identical points and you have not heard my
18 submissions on that yet.

19 THE CHAIRMAN: Well, we are willing to
20 hear them now.

21 MR. COLBORNE: The motion, such as it is,
22 to my reading has three branches in that the operative
23 paragraph is divided into three clauses by semi-colons.
24 You've read it, so I hope that it's clear for me to say
25 that I read the first branch as dealing with licences,

1 directed at some sections of the government saying:
2 Look, when you are issuing a licence you don't have to
3 prepare an EA, if that is all you are doing, but when
4 that process falls within a more general management
5 undertaking, it's not obvious that it is intended to
6 hive off an area of activity. In other words, if
7 something is part of the undertaking it's part of the
8 assessment, and I will be referring to the proponent's
9 case to show that the issuing of licences and licensing
10 and so on is part of the undertaking.

11 In a class environmental assessment where
12 the undertaking could involve hundreds of thousands of
13 individual licences et cetera, then common sense says
14 that the Board wouldn't deal with them individually.
15 But I submit that that does not necessarily mean that
16 the Board is precluded from dealing with an individual
17 licence within a class environmental assessment if it's
18 part of the undertaking if it makes sense to do so.

19 If there is some compelling reason that
20 is relevant and has to do with an issue before the
21 Board, then I submit that Section 9 does not have the
22 effect of hiving off that one piece of what the
23 proponent does.

24 Now, Mr. Chairman, I find some support in
25 this submission in the document that Mr. Freidin filed

1 the second branch as dealing with licensing as a more
2 general form of activity, and the third branch dealing
3 with entitlement and allocation.

4 I'm going to be submitting that in some
5 respects each of those branches ought to be looked at
6 separately because they are different to a certain
7 degree.

8 Now, I did have submissions regarding
9 Section 9 of Regulation 205 which I understand to be
10 the main or the sole enactment which Mr. Freidin is
11 replying upon, but Mr. Hunter said a good deal of what
12 I would have said, so I just want to add to his
13 submissions this one: That even if one ignores Section
14 10 of that regulation, even if one concludes that
15 Section 10 does not modify and should be read with
16 Section 9 - which is a conclusion which I'm not asking
17 you to draw - I adopt Mr. Hunter's submission that you
18 must read 10 as qualifying 9; but even if you do not
19 consider 10, I submit that Section 9 itself may
20 nevertheless not exclude you from dealing with licences
21 and certainly not licensing or entitlement within a
22 class environmental assessment.

23 My submission is really of a common sense
24 nature, that where an undertaking has many facets, that
25 a regulation of that type which appears simply to be

1 to accompany the regulation itself, and that is the EA
2 Update Newsletter published by the Minister of the
3 Environment. That document states on its first page
4 that:

5 "General administrative activities that
6 do not have significant environmental
7 effects..."

8 Excuse me, it's the document titled:
9 Background Notes for Regulation and Exemption Orders,
10 which is I think the second leaf in the small
11 collection that Mr. Freidin used. And my submission is
12 that that general reference tells you why this
13 regulation is in place and what it is attempting to
14 exempt.

15 "General administrative activities that
16 do not have significant environmental
17 effects..." such as the issuing of a
18 licence. And then if one refers to the general
19 description of Section 9, it says that:

20 "Loans, grants, permits, et cetera, are
21 not in themselves undertakings which
22 require environmental assessment."

23 And I stress the term or the phrase 'in
24 themselves', and that says to me that in themselves
25 they are not but once they are part of a larger issue

1 that is before the Board --

2 THE CHAIRMAN: Well, just a moment.
3 Where does it say that they are not in themselves
4 undertakings? It says they are not subject to 5(1) of
5 the Act.

6 MR. FREIDIN: The Act says that.
7 Mr. Colborne is referring to the third page of the EA
8 Update which comments or is a commentary on that and
9 the commentary uses those two words that he referred
10 to.

11 MR. COLBORNE: Yes. It's right at
12 the bottom of the third leaf that was distributed by
13 Mr. Freidin.

14 THE CHAIRMAN: Thank you.

15 MR. COLBORNE: So I emphasize those words
16 'in themselves' to mean that if they appear in a
17 broader context, then the object of the regulation is
18 not to exempt them.

19 Now, that is all I have to say --

20 THE CHAIRMAN: Excuse me. Is what you
21 are saying, Mr. Colborne, that if in fact you have a
22 particular allocation or a particular licence or grant
23 that is significant in terms of environmental impact,
24 it would not then be covered by Section 9?

25 MR. COLBORNE: Yes.

1 THE CHAIRMAN: And who makes the
2 determination as to the significance--

3 MR. COLBORNE: This Board.

4 THE CHAIRMAN: --in determining whether
5 or not to apply this exemption, if it is an exemption?

6 MR. COLBORNE: In determining whether or
7 not that licence is within the undertaking which this
8 Board is hearing evidence concerning and which this
9 Board is being asked to approve.

10 THE CHAIRMAN: So apart from any
11 consideration of Section 10--

12 MR. COLBORNE: Yes.

13 THE CHAIRMAN: --your position is, is
14 that if this Board feels that allocations in general
15 through the decision-making process have significant
16 environmental impact, then this exemption, Section 9,
17 was not meant to cover that in any event; would that be
18 Correct?

19 MR. COLBORNE: Yes.

20 THE CHAIRMAN: And that could even
21 include a specific grant or licence--

22 MR. COLBORNE: Could.

23 THE CHAIRMAN: --if the Board felt that
24 in that specific case there was a significant potential
25 environmental impact.

1 MR. COLBORNE: Yes, it could. I can't
2 give you an example because I can't imagine an example
3 in the context of this hearing, but I'm saying it's not
4 impossible and it's not precluded in Section 9. That
5 is my submission.

6 THE CHAIRMAN: Very well.

7 MR. COLBORNE: That is all I have to say
8 about the regulation itself.

9 But I do have some submissions that have
10 to do with the second two branches of the motion, and I
11 believe they are much wider than the first one; that
12 is, having to do with licensing and allocation and
13 entitlement.

14 Now, I say to you that it's difficult for
15 me to imagine what could be more central to the
16 environmental assessment process than matters of that
17 type. But before proceeding into that, I want to make
18 some further distinctions because I believe that this
19 issue is a very broad and complicated one. I'm trying
20 to break it down a little bit.

21 The three distinctions are these: There
22 is the question of what is within the jurisdiction of
23 the Board in terms of making orders; there is the
24 question of the scope of cross-examination and I'll be
25 suggesting, for instance, that a party might properly

1 cross-examine in respect of a matter that would not be
2 within the jurisdiction of the Board, the Board's power
3 to make orders because of the law in regard to
4 cross-examination, the breadth and importance of it,
5 and between those two there is an intermediary
6 question; and, that is, what might properly be the
7 subject for evidence-in-chief. Perhaps I shouldn't say
8 evidence-in-chief, any evidence.

9 Once again I say that it is possible, and
10 in the case of this hearing I think probable, that you
11 might hear evidence - and I think you've already heard
12 a lot of it - that has to do with matters that you
13 would not include in an order. There is a lot of
14 commonality, mind you, between those three things. I'm
15 not trying to suggest they are radically different.

16 And my general position is that what you
17 can make an order concerning has to do with mainly
18 jurisdiction, whereas the other two; that is, what is
19 properly evidence and what is properly
20 cross-examination, have more to do with relevance. I
21 want to deal with those three points separately,
22 although I would ask that you hear my submissions as if
23 they inter-relate because they do.

24 Firstly, whether the Board can make an
25 order in regard to a licence, in regard to licensing,

1 in regard to entitlement or allocation, first of all, I
2 can't but refer you to the breadth of the wording in
3 Section 2 of the Environmental Assessment Act itself,
4 the breadth of the definition of environment and so on.

5 I represent 25 communities who say that
6 the social and economic conditions - and those are the
7 words that one finds in the definition of environment -
8 the social and economic conditions which they face is
9 affected by things like the allocation of the benefits
10 of the forest resource and, more specifically, that
11 they don't get any or almost none.

12 And I have been saying from the outset
13 that my client's position is that it opposes this
14 undertaking and unless something happens between now
15 and final submissions that change my instructions, we
16 will be asking the Board to decide that this
17 environmental assessment is not accepted and the
18 proponent shall have no approval to proceed. And the
19 reasons have been before you since our opening
20 statement; that is, no benefits and the activities
21 associated with the undertaking have the effect of
22 expropriating land rights that are ours, my client's.

23 Those are the reasons why we are going to
24 ask you, unless something changes between now and the
25 end of this hearing, we are going to ask you to order

1 no approval.

2 THE CHAIRMAN: All right. Are you going
3 to request the Board to deny this application on the
4 basis - well, not on the basis - on the merits of the
5 application or rather upon the acceptability of the
6 assessment?

7 MR. COLBORNE: I don't understand the
8 distinction, Mr. Chairman.

9 THE CHAIRMAN: Well, there is a
10 two-pronged approval that this Board is required to
11 make: (a) that the EA put before the Board is
12 acceptable; i.e., complete in the sense that it meets
13 the requirements of Section 5(3), not only the document
14 as submitted but including evidence that may be
15 properly brought before this Board, and if the Board is
16 of the view that the document is acceptable, the EA is
17 acceptable, it then is charged under Section 12(2) to
18 go on to find whether or not the undertaking should
19 proceed and, if so, with or without conditions.

20 MR. COLBORNE: Yes.

21 THE CHAIRMAN: The Board has held in
22 previous cases, other panels of the Environmental
23 Assessment Board and Joint Boards, that you really
24 can't get to the second decision until you have
25 essentially found the EA to be acceptable.

1 MR. COLBORNE: Yes.

2 THE CHAIRMAN: In other words, if you
3 find it unacceptable after all the evidence is in, then
4 you can't go on to determine whether or not the case
5 succeeds or fails on the merits, it's a two-staged
6 thing.

7 And so, as I understand what you are
8 saying - and correct me if I'm wrong - your client's
9 position is going to primarily address the second part;
10 that is, it should be denied on the merits on the basis
11 that no benefits accrue to your clients resulting in
12 unacceptable environmental impacts from the activities
13 before this Board for approval.

14 Is that essentially what we are saying,
15 or your position?

16 MR. COLBORNE: That would be essentially
17 it, but as I said a few minutes ago, Mr. Chairman, we
18 would be asking both that it not be accepted and that
19 it not be approved. And the reason for the
20 non-acceptance - but, again, this is subject to
21 evidence that may be more than a year from now; reply
22 evidence for instance can repair problems with the
23 evidence-in-chief - but we say, for instance, that
24 there is not sufficient evidence on the two problems
25 that are of concern to us, allocation and Indian land

1 rights under treaty.

2 So we would be objecting to or we would
3 be saying that both of the branches that the Board must
4 consider at the end of the hearing should result in a
5 decision contrary to what the proponent is asking for.

6 THE CHAIRMAN: Okay. Well, I think that
7 can be argued later. The one aspect that concerns the
8 Board I think, and you might as well clarify it at this
9 point, is the treaty part, the assessment of lands
10 under treaty. Are you asking this Board to determine
11 treaty rights?

12 MR. COLBORNE: No.

13 THE CHAIRMAN: Okay.

14 MR. COLBORNE: Maybe I can clarify that
15 right now.

16 THE CHAIRMAN: All right. It keeps
17 reoccurring. The Board isn't trying to, in any way,
18 absolve itself from any responsibilities it feels that
19 it has with respect to this undertaking. We do see,
20 however, some jurisdictional problems relative to this
21 Board determining treaty rights and we have stated that
22 on earlier occasions.

23 MR. COLBORNE: Yes. Let me try to be
24 clear. I know this is an issue which does not lend
25 itself to clarity, but I will try.

1 I do not believe - and I will not ask
2 this Board to act otherwise - that it must decide
3 whether or not there are Indian treaty rights in the
4 territory that my clients are interested in. Equally I
5 do not believe that this Board is required to decide
6 what those treaty land rights might be with any
7 particularity, but I believe that the state of the
8 evidence at the end of the hearing will be that in
9 respect of Crown lands within the area of the
10 undertaking there are only two competing owners: The
11 Crown and the Indians.

12 The law is very clear that licence
13 holders have no interest in land. The law is very
14 clear that the Crown has a substantial and paramount
15 interest in Crown land, but I do not believe that there
16 will be any evidence before you that the Indians have
17 no land interest, in fact you already have ample
18 evidence from the proponent whom I have stood here and
19 characterized as anti-Indian and I will do it again,
20 even from the proponent saying the Indians have land
21 interests, and this is the old distinction between land
22 and personal interests.

23 There is nobody else out there, not the
24 industry, not the non-status Indian residents of the
25 region, not the tourist industry for instance in regard

1 to Crown lands who have any land interests. Status
2 Indians under treaty are the only ones who have, and I
3 assure you I will not ask you to decide how much it is,
4 but if at the end of the hearing you think that it is
5 relevant to whether or not you should approve, or what
6 terms or conditions you should impose that that land
7 interest is in fact being ignored or whatever you are
8 satisfied is or is not the case, then it is properly
9 before you and it could be the subject of an order, and
10 I think it's a little premature now for me to start
11 speculating about what that might be or what that might
12 not be, but I'm here to say that I intend, if I can, to
13 bring evidence to place you in that position at the end
14 of the hearing where the uncontested fact of an Indian
15 land right will be one factor that you must consider.
16 I hope that is clear.

17 I would like to go on and tell you a
18 little more about how I see that fitting into the
19 jurisdiction of the Board.

20 THE CHAIRMAN: Well, okay. But in order
21 to reach a determination like that, does not the Board
22 find itself in the position of having to determine the
23 right?

24 MR. COLBORNE: No, I don't believe so.

25 THE CHAIRMAN: I mean, we can obviously

1 determine whether or not the proponent's undertaking
2 should receive approval or under what conditions based
3 upon the impact of the activity on the native
4 communities or any other community or any other
5 stakeholder out there, but that is not any different
6 from the normal considerations the Board would make in
7 any environmental assessment case, but if the added
8 feature, that may be unique in this case, is that there
9 may be two competing owners so to speak, if we can use
10 that terminology broadly, to the same piece of ground
11 within the area of the undertaking, if that factor is
12 going to be a determining factor in the Board's overall
13 decision, apart from impact, environmental impact, do
14 we not have to, in order to consider that additional
15 factor, make a determination as to ownership?

16 MR. COLBORNE: If it is in issue. If the
17 Ministry or any party says - and I think they have to
18 do more than just say it - but says: No, we don't
19 agree that there is an Indian land interest, then I
20 agree it's really away from this Board. But if all
21 parties are either silent on the question or say: Yes,
22 there is an Indian land interest, then it's a factor
23 that you, I submit, cannot ignore.

24 THE CHAIRMAN: No, but if the parties are
25 saying: Yes, there may be an interest amongst

1 competing owners, the native communities and the Crown,
2 but these interests are in fact going to be determined
3 in another forum, either through negotiation or through
4 the courts, is it not incumbent on this Board to decide
5 at some stage whether or not any of that is properly
6 within the jurisdiction of this Board?

7 MR. COLBORNE: No. I would submit that
8 it is within the jurisdiction of the Board but you can
9 decide what you want to do with it, but you can't just
10 hive it off and say: This has some special aspect to
11 it and, therefore, we won't hear it, we don't want to
12 touch it.

13 THE CHAIRMAN: Well, there may be, there
14 may be a view that it is not within the jurisdiction of
15 the Board to determine land ownership rights.

16 MR. COLBORNE: I agree with that, but I'm
17 saying that you don't have to determine it if there is
18 no issue in terms of the evidence that is before you.

19 My anticipation of the state of the
20 evidence at the end of the hearing is that that issue
21 will not be there, there will not be evidence, at least
22 not evidence which you accept.

23 THE CHAIRMAN: I don't want to belabour
24 it, but where I'm losing you is: If we are to take
25 into account the fact there is competing ownership to

1 the same land within the area of the undertaking and
2 that is a factor that we are to take into account above
3 any other factors which would be considered relevant to
4 the native communities or any other stakeholder, the
5 environmental impact of the activities, whether it's
6 the tourist industry, whether it's the native
7 communities, whether it's a cottage owner, if we are to
8 take and place any further weight of the impact upon
9 the native communities of these activities being
10 carried out, which is somehow based upon their
11 competing right to ownership as an additional factor,
12 do we not have to determine whether or not they in fact
13 have that right of ownership? That is all I'm saying.

14 You are asking us not to make a
15 determination but to take into account that there may
16 be competing interests of ownership and to somehow
17 throw that into the hopper and weigh it along with all
18 other environmental impacts against your client's or
19 any other stakeholders, and all I'm saying is: If you
20 are asking us to use that factor as an additional
21 factor to be viewed in weighing the impacts upon your
22 clients, do we not have to determine whether there is a
23 legal basis for that factor?

24 MR. COLBORNE: No.

25 THE CHAIRMAN: Okay.

1 MR. COLBORNE: But at the risk of
2 repeating myself, you only have to determine it if
3 there is competing evidence before you. I'm saying
4 that I believe at the end of this case there will not
5 be competing evidence before you. If I'm wrong, then I
6 accept what you say, this Board is not here to decide:
7 Yes or no there is an Indian land right.

8 THE CHAIRMAN: Okay. So your position is
9 if it's an acknowledged fact or if it's an undisputed
10 fact that there may be competing ownership --

11 MR. COLBORNE: Not maybe, I'm saying that
12 if at the end of the evidence it is undisputed that
13 there is an Indian land right --

14 THE CHAIRMAN: Then we don't have to
15 determine--

16 MR. COLBORNE: You don't have to determine
17 what it amounts to.

18 THE CHAIRMAN: --what the percentage is
19 or what it amounts to or anything else.

20 MR. COLBORNE: It is just one other thing
21 that is evidence that has been proven and it's
22 relevant.

23 THE CHAIRMAN: All right. Well, if that
24 is the case at the end of the hearing.

25 MR. COLBORNE: Yes. Two subsidiary

1 points. You suggested that I might be asking you to
2 give that type of fact, as it were, some higher status
3 in terms of fact.

4 THE CHAIRMAN: Not a higher status, just
5 an additional fact that isn't available to other
6 stakeholders based on your premise that only two
7 competing groups have claims of ownership to the same
8 piece of land.

9 MR. COLBORNE: I see. I would remind you
10 that the right that I am referring to you is the only
11 one that has constitutional protection in this country
12 and the constitution is as binding on - it's binding on
13 all of us really.

14 And the second thing is, I'm not talking
15 about native communities, I'm talking about the status
16 Indian members of the bands who I represent. There are
17 native communities who may be in the same fix that my
18 clients are in, but they may not have land rights as
19 such.

20 And so my position is not one based on
21 ancestry, it's one based on adherence to a treaty, the
22 rights of which are enshrined and recognized by the
23 constitution of this country, and these are legal
24 rights.

25 And I would say that if constitutionally

1 recognized legal rights are something that this Board
2 somehow has to keep away from, that is just wrong, it
3 could not be sown.

4 Mr. Chairman, I wanted to tell you why I
5 was advising that my client opposed the undertaking.
6 There is a reason for that that has to do directly with
7 the motion. This motion, the way it is before you, it
8 arrogantly assumes that you wouldn't dare refuse to
9 approve the undertaking. It does that because if you
10 did refuse the undertaking then the current licensing
11 schemes, allocations and so on are all out the window.
12 So insofar as your jurisdiction to make orders is
13 concerned, the motion is framed to exclude the
14 possibility. It doesn't make any sense except in terms
15 of an approval by this Board of the undertaking.

16 The Ministry has assumed that you
17 couldn't possibly refuse because if you refused, then
18 everything they say that is outside your jurisdiction
19 has been dealt with by your order.

20 THE CHAIRMAN: Well, let's clarify that
21 right now. Under 12(2) of the Act, the Board can
22 clearly deny the application, it can refuse to accept
23 both the environmental assessment and it can refuse
24 approval to proceed with the undertaking.

25 MR. COLBORNE: Right.

1 THE CHAIRMAN: I don't think there is any
2 question that the Board has that jurisdiction--

3 MR. COLBORNE: Absolutely.

4 THE CHAIRMAN: --to render that type of
5 decision. And I don't think really - although you may
6 have imputed that from the wording of the motion - I
7 don't think the Ministry has ever suggested otherwise,
8 that the Board does not have the jurisdiction to refuse
9 this undertaking outright.

10 MR. COLBORNE: But there is a reason for
11 saying this.

12 MR. FREIDIN: Perhaps I should clarify
13 that motion so we don't proceed on some error. I
14 accept the proposition if the Board finds the timber
15 management as defined and as carried out
16 environmentally unacceptable and says: No way, you
17 can't carry out those activities until such time as
18 something done by way of reason of or by way of
19 exemption or something else, any licence that may be
20 issued that says you can go out there and cut isn't
21 worth the paper it's written on. That is the point I
22 made in my submissions.

23 And you can say that it's bad and what
24 should be changed and what is no good about timber
25 management and you say it should be this way or that

1 way, that affects what a licensee can do. And if you
2 say you can't do anything because it's all bad, the
3 licensee can do nothing.

4 MR. COLBORNE: How then can you make an
5 order saying we have no jurisdiction to deal with
6 entitlement, allocation, licensing schemes and so on
7 because you obviously do, your order refusing deals
8 with exactly those topics.

9 And, Mr. Chairman, I say that that
10 possibility, that power that you have and you are
11 required - you mentioned Section 12 - under 12(3) of
12 the Act your duty is to hold the hearing and decide the
13 matters referred, and that includes the power to
14 refuse.

15 That is why I mentioned what my client's
16 position is, at least at this time, because surely we
17 have the ability to bring evidence, to make argument,
18 cross-examine in an effort to urge you to refuse the
19 undertaking. We don't have to tailor everything we do
20 here in terms of what terms and conditions you may
21 impose. Maybe that is Mr. Freidin's assumption about
22 what we are doing here, but that is not the law. There
23 is that residual possibility that the undertaking would
24 not be approved, and I think every party has a right to
25 govern itself accordingly.

1 THE CHAIRMAN: Well, everything I have
2 said, Mr. Colborne, is subject to the gray area in this
3 legislation which does not appear to allow the Board
4 the power to refuse the acceptance of the environmental
5 assessment. It can deny approval to proceed, it
6 appears to be able to accept, to give an acceptance or
7 amendment an acceptance of the EA - but it's something
8 that has arisen in other cases upon which I have
9 presided - it does not seem to have the wording in
10 there that the Board has the power to refuse the
11 environmental assessment itself.

12 It's just one of these things when you
13 read the wording that it allows us to accept it as it
14 is or with amendment; it doesn't appear to allow us to
15 refuse the environmental assessment and it clearly
16 allows us to approve or deny approval to proceed.

17 MR. COLBORNE: Yes.

18 THE CHAIRMAN: And it seems to be a
19 little different when you read what the Minister's
20 powers are as opposed to the Board's powers on the
21 acceptance of the assessment.

22 And this is something that I don't mind
23 telling you has been pointed out to the Minister of the
24 Environment in terms of some day revamping this
25 legislation to make it a little clearer.

1 MR.COLBORNE: I read those sections and I
2 was a little confused and I tried to phrase my...

3 THE CHAIRMAN: The end result, I might
4 suggest, doesn't matter a heck of a lot in the sense
5 that if you don't get the approval to proceed it
6 doesn't really matter, I would suggest, whether or not
7 your assessment was good or bad.

8 MR. COLBORNE: Yes. Mr. Chairman, I
9 tried to phrase my notes for these submissions in terms
10 of the words of the Act, but I wasn't exactly sure what
11 it meant. I just knew what the end result was.

12 THE CHAIRMAN: Yes. I think there has
13 been a basic, if I might put it this way, flaw in the
14 drafting of this piece of legislation in that the
15 drafters approached it on the basis of two
16 decision-making authorities making the decision; one
17 the Minister without a hearing, and (b) the Board with
18 a hearing and, unfortunately, they have given some
19 powers to the Minister such as to require further
20 studies which doesn't appear to be given to the Board,
21 and it's obvious because the Minister wouldn't have the
22 benefit of hearing oral evidence or submissions of
23 various parties because, of course, no hearing is held.

24 When they transfer the same
25 decision-making authority over to the Board, they

1 haven't carried forward reciprocal powers in the same
2 way and, as a consequence, I feel personally that this
3 is a very difficult legislation to interpret and the
4 Board, over a series of decisions, has done its best to
5 interpret it in a way in which it will render the
6 hearing process meaningful, otherwise it just doesn't
7 make any sense.

8 For instance - and I don't want to go on
9 at length about this - if you restrict the
10 environmental assessment to only the documents
11 submitted pursuant to Section 5(1) which may be years
12 in advance of a hearing, then what happens to all of
13 the information that may occur between the submission
14 of the document and the date of the actual hearing?
15 Does that mean at the hearing you can't refer to
16 anything that was not included within the assessment
17 document itself?

18 I suggest to you, if you read the
19 definition section of the environmental assessment of
20 what constitutes an assessment, you might come to that
21 conclusion. It doesn't, however, make any sense
22 whatsoever in the context of a hearing and the Board,
23 over a series of decisions, has decided effectively
24 that the assessment will include not only what's in the
25 document but also the evidence that is properly adduced

1 before the Board.

2 And I just caution the parties when they
3 are coming to interpret this legislation, I'm sure
4 they'll have as much difficulty as the Board does
5 sometimes, you have to sometimes look to see who is
6 exercising the authority, if it's the Minister; there
7 may be some different considerations applicable when
8 it's the Board. Anyways...

9 MR. COLBORNE: Well, Mr. Chairman, I'm a
10 little out of the order that I wanted to follow, but I
11 did speak of the fact that you could not give approval
12 to proceed and, therefore, whatever the effects of that
13 are clearly within your jurisdiction. You might say
14 that you are still interested in whether you can impose
15 terms and conditions that have to do with things like
16 licensing schemes, entitlement, allocation and so on,
17 and my submission is that you have and, for these
18 reasons.

19 First of all, I've had my say about
20 Regulation 205, I simply don't think that Section 9,
21 especially with Section 10 added, goes so far as to
22 impair your ability to make almost any kind of terms
23 and conditions, provided they are relevant and
24 reasonable and obviously within your jurisdiction, but
25 I'm going to be saying in a few minutes that relevant

1 and reasonable are really the tests to decide whether
2 it's within your jurisdiction.

3 But as to allocation, it's a very, very
4 broad word as Mr. Hunter says, and if you look in the
5 Environmental Assessment Act itself you start finding
6 allocation. Now, Section 2, the purpose section,
7 refers to the whole or any part of Ontario. That's
8 allocation. And under Section 14(2) of the Act --

9 THE CHAIRMAN: No, Mr. Colborne, I'm not
10 sure I follow you. What is allocation with respect to
11 Section 2?

12 MR. COLBORNE: Under Section 14(2) you
13 are obligated at this hearing to take into account --
14 sorry, to consider Section 2 in respect of any terms
15 and conditions that you might impose. Section 2 says
16 that:

17 "The purpose of the Act is the betterment
18 of the people of the whole or any part of
19 Ontario."

20 Now, that invites the Board to impose a
21 term that allocates or prefers or causes betterment to
22 the people of "any part of Ontario". I can only read
23 that as saying as opposed to other parts of Ontario.

24 I would also refer you to the definition
25 of environment which includes the phrase "man or a

1 community", this is 1(c)(3) of the Act:

2 "The social, economic and cultural
3 conditions that influence the life of
4 man..." generically I am sure:
5 "...or a community."

6 I suggest that that in the broadest sense
7 is an allocation provision, permits allocation.
8 Allocation is almost the foundation of what is being
9 done at an environmental assessment hearing if you use
10 the term in the broadest sense.

11 If one looks at the section, that is
12 14(1)(b), that does refer to the terms and conditions
13 that might be required, there are a couple there that I
14 read as being allocation provisions in the broad sense.

15 THE CHAIRMAN: Don't forget, that's where
16 the Minister has accepted it.

17 MR. COLBORNE: Yes, it is. Perhaps I am
18 misreading the Act, but I understood this to be the
19 list that would provide guidance to the Board as to
20 what types of terms and conditions it might recommend.

21 THE CHAIRMAN: Provides guidance.

22 MR. COLBORNE: Yes.

23 THE CHAIRMAN: It may not be inclusive.

24 MR. COLBORNE: I was not reading it as
25 being inclusive. I would just refer you to (ii):

1 "Actions to prevent, mitigate or remedy
2 effects of the undertaking on the
3 environment..." and the environment
4 includes a community.

5 I would suggest that particular
6 communities, including communities that I represent, an
7 order could be made to, as this says, "prevent,
8 mitigate or remedy effects of the undertaking" on them,
9 and I'm going to be referring to a case in a moment
10 that discusses that point.

11 Also (iv), that is 14(1)(b)(iv) says
12 that:

13 "The proponent enter into one or more
14 agreements related to the undertaking
15 with any person with respect to such
16 matters as the Minister considers
17 necessary."

18 I don't know what the Board's practice
19 is. I assume in this submission that the Board would
20 see this as providing guidance to the effect that a
21 term or condition recommending that the proponent enter
22 into certain types of agreement could properly be part
23 of terms and conditions in a final order of the Board,
24 and this subparagraph refers to any person. It's
25 obviously an allocation invitation.

1 That person must be someone, and so the
2 term or condition contemplated by this subparagraph
3 contemplates allocation of some kind or a
4 recommendation of allocation. It doesn't say anything
5 like provided there is no cost or inconvenience to
6 somebody; it doesn't say provided it has nothing to do
7 with allocations of a public resource. There is no
8 provisos on that. I think it's a very, very broadly
9 phrased paragraph and it invites interpretation and it
10 has to do with allocation.

11 Now, I'm going to be pointing out that
12 the proponent has dealt with allocation in its
13 assessment, but the fact nevertheless is that the
14 proponent's case has not dealt extensively with
15 licensing and allocation, that I agree, and that may be
16 why this problem arises at the end of the Ministry's
17 case.

18 At least some of the parties may be
19 saying - and I read the statement of issues by NAN as
20 saying this, and I'm saying it - that the assessment
21 isn't complete, there hasn't been a sufficient look at
22 the licensing schemes, the allocation questions and so
23 on, not enough to assess the effects on the human
24 environment. And if you exclude examination of those
25 things, perhaps the assessment is not adequate.

1 So the question here is: Can a party
2 essentially self-assess by unilaterally deleting an
3 area from its case? And I ask: Isn't self-assessment
4 exactly what this Board was created to put an end to?

5 What if, for instance, the proponent had
6 come in and said: Well, we don't think that planning
7 has to do with cutting down trees in the bush so we are
8 not going to tell you anything about our planning.
9 Could they do that? Well, I don't know, but I submit
10 they can't.

11 But they are coming in and saying: We
12 don't want you to look at who gets the benefit of this
13 enormous public resource, we want you to stay away from
14 that. Well, do they define that? My submission is
15 that they don't. And I mentioned earlier that I have a
16 collection of authorities. I've provided these to
17 other counsel. (handed)

18 THE CHAIRMAN: Thank you.

19 MR. COLBORNE: I hope I'm not --

20 THE CHAIRMAN: It's a good start anyway.

21 MR. COLBORNE: I hope I'm not accused of
22 proceeding in perhaps a cynical matter, but the first
23 reference I have is to your book, Mr. Chairman. I
24 assure my friends and yourself that the reason why that
25 is the first reference is because it follows logically

1 with my argument.

2 And there I have excerpted in the first
3 two numbered pages paragraphs 1.56 and 1.61 -- excuse
4 me, this would be pages 2, 3 and 4, paragraphs 1.56,
5 1.61 and 5.34 from your book, Mr. Chairman.

6 MR. FREIDIN: I apologize. Could you
7 just give me those again, what you are referring to?

8 MR. COLBORNE: Mr. Chairman, I'm not
9 going to take up the time of the hearing to read these,
10 if that is permissible. I've given you the paragraph
11 references and I would like to just summarize them.

12 MR. FREIDIN: I just didn't get the
13 actual references.

14 MR. COLBORNE: 1.56, 1.61 and 5.34.

15 MR. FREIDIN: Thank you.

16 MR. COLBORNE: The first two have to do
17 with self-assessment essentially saying this Board is
18 here so that the public knows that there is some
19 independent view of things and that the proponent
20 doesn't simply and internally and unilaterally decide
21 whether what it is doing is environmentally sound or
22 not.

23 And the third one has to do more
24 generally with jurisdiction where you say, Mr.
25 Chairman, that:

1 "It is the position of the Board that a
2 proponent which is a municipality or for
3 that matter a provincial ministry or
4 Crown agency shall be treated like any
5 other party before the Board with the
6 latter having the jurisdiction to
7 exercise its unfettered discretion as to
8 whether or not the application meets the
9 requirements of the legislation. To take
10 a contrary position would severely
11 undermine the independence and integrity
12 of the environmental decision-making
13 process."

14 Now, I refer to these and file them in
15 support of my submission to you that here we are at the
16 end of the case and at least two of the parties are
17 saying there has been some evidence on allocation but
18 not enough.

19 I've also included a case reference that
20 you have no doubt looked at and had referred to many
21 times. It's the Joint Board and Ontario Hydro case.
22 It begins at page 5 of this set of authorities, but the
23 passage I want to refer to is at page 14.

24 Beginning partway through the long
25 paragraph at the middle of the page, the Divisional

1 Court says as follows:

2 "We are of the opinion that those powers
3 permit the Board to attach as a condition
4 to its approval of the undertaking the
5 acceptance by Hydro of any one of the
6 methods of carrying out the undertaking
7 originally identified by Hydro. Indeed
8 it could attach as a condition of its
9 approval the adoption by Hydro of a
10 method of carrying out the undertaking
11 never previously considered by Hydro."

12 And at the end of the paragraph:

13 "To hold otherwise would diminish the
14 power of the Board to approve
15 undertakings and curtail the utility's
16 submissions by interested participants in
17 the hearings."

18 I submit that that is quite relevant
19 here, Mr. Chairman. I want to call evidence and
20 cross-examine both to demonstrate reasons why there
21 should not be approval and to demonstrate other methods
22 of carrying out the undertaking, methods which would be
23 more advantageous to my clients.

24 Now, the words 'a method never previously
25 considered by Hydro', I submit establish conclusively

1 that the proponent does not define the Board's
2 jurisdiction by what it puts in evidence. Another
3 party can bring forward evidence and can cross-examine
4 in order to put before the Board sufficient evidence
5 that the Board might use to identify a method not even
6 considered by the proponent.

7 Now, Mr. Chairman, I want to say a few
8 words about what is properly evidence. I have been
9 talking about the Board's jurisdiction in more general
10 terms, now I want to talk a little more specifically
11 about what is admissible and what is not admissible as
12 evidence.

13 And Mr. Freidin said he was concerned
14 that parties might spend money preparing evidence that
15 winds up being inadmissible, and I appreciate his
16 solicitude on that, but I have refrained and other
17 parties have refrained from telling his client where to
18 spend their money. But, nevertheless, his point is
19 acceptable to the extent that most of the parties here
20 are under very severe restraints and wouldn't want to
21 be out there preparing evidence that wound up being
22 unacceptable. So I do want to say some words on that
23 topic.

24 We have said from the beginning; that is,
25 my clients, that we are going to call evidence to

1 establish that we get no benefits from the resource and
2 that our land rights are ignored. Now, does the Board
3 have to hear this evidence?

4 The first reference I want to make is to
5 Section 15 of the Statutory Powers Procedure Act. It's
6 not in my book of authorities. I told the other
7 counsel earlier that I would be referring to it, only
8 the one short passage. That section states that:

9 "The tribunal may admit as evidence
10 anything that is "relevant to the subject
11 matter of the proceedings" and may act on
12 such evidence, but the tribunal may
13 exclude anything unduly repetitious."

14 I consider that to be totally binding on
15 me in terms of my preparations, I think all parties
16 have this in mind. My clients don't have the money to
17 put panels of evidence up here for the kind of time
18 that we have seen. There is no -- there is a clear
19 recognition of the need not to be repetitious and to be
20 relevant.

21 Now, commenting on this section, you,
22 Mr. Chairman, have said at paragraph 3.18, that is page
23 27 of this book, that:

24 "The Board has given a wide latitude as
25 to what is admissible and will only

1 exclude those categories of evidence that
2 are clearly inadmissible in a court by
3 reason of any privilege under the law of
4 evidence or that is inadmisssible by
5 statute or evidence that the Board does
6 not feel is relevant to the matters
7 before it for adjudication."

8 Relevance is the test, I submit, as
9 opposed to - just so I can be clear - as opposed to
10 what the Board might include in an order at the end.
11 The two may not be identical.

12 Now, I have included in this book of
13 authorities two pages of transcript, pages 252 and 253
14 from May 14th, I believe, 1988. The reason I include
15 these is to point out that my client has said --

16 THE CHAIRMAN: Which page?

17 MR. COLBORNE: I'm sorry, page 28 and 29.

18 If I could just read beginning at line
19 13. This is Mr. Kakaway speaking on behalf of my
20 client.

21 "The above is a brief outline of our
22 concerns. As we see these hearings
23 now, we will be focusing on two types of
24 issues in our territory. Firstly, we are
25 going to want to know from the witnesses

1 and, in detail, which forest management
2 practices are in accordance with the
3 honouring of our treaty rights and which
4 ones are not. Where they are not in
5 accordance with our treaty rights,
6 we will be advising of changes that
7 must be made.

8 Secondly, we will be focusing on why the
9 jobs and profits from the forest never
10 remain in our communities so we will be
11 advising on how this must be changed."

12 That was 20 months ago. I have also
13 included at pages 30, 31 and 32 something from 12
14 months ago. That is a statement of issues for Panel 8.
15 And I won't bother reading from that, I will just say
16 that a year ago my client's filings continued to be
17 consistent with what it said it was here for.

18 Then, it is now January of 1990, and if I
19 understand the motion perhaps a little better this
20 morning from Mr. Freidin, he is saying these things
21 which my client has been here before the Board for
22 almost two years saying it is concerned with is not
23 within the jurisdiction of the Board.

24 Now, I suggest that if this were such an
25 obvious jurisdiction question it would have been raised

1 long ago. I suggest that what is being raised is that
2 the proponent would prefer not to have to address
3 certain hard questions, but that is not a jurisdiction
4 point.

5 Now, hard questions mean that parties
6 have different interests. My client is not a public
7 interest group, my client is composed of 12,000 people
8 who have particular rights and if what they can say
9 through being represented here at this hearing has
10 benefits to other people well, well and good, but they
11 are only here to represent their own rights and their
12 rights may not be the same as the general rights of all
13 the people of Ontario. Their rights may not be the
14 same as other parties and, to some extent, they aren't.
15 And this will raise hard questions. Their rights are
16 certainly in opposition to the rights of the proponent,
17 but the proponent is just another party here.

18 And I've included at pages 33, 34 and 35
19 of the book of authorities, Mr. Chairman, your comments
20 on the Decom - I don't know if I'm pronouncing that
21 correctly - Decom Medical Waste Systems case where you
22 expressly point out - and this is under the
23 Environmental Protection Act I recognize - where you
24 expressly point out on the middle of page 34 of the
25 book that there are these different interests. You

1 refer to interests of the public at large, interests of
2 the proponent, interests of the customers in that case,
3 interests of persons in opposition, and it is the duty
4 of the Board to balance those interests.

5 So my general submission on what is
6 properly before this Board in terms of evidence is
7 whether it's relevant or not and, generally speaking,
8 what the proponent considered relevant in its evidence
9 and was admitted by the Board is a partial guide, but
10 it doesn't determine what is relevant. If the
11 proponent left something out and it's relevant, I can
12 call it or any other party can call it.

13 But having said that, I think it's proper
14 to point out now that the proponent has given -- has
15 brought a lot of evidence on the very subjects that it
16 says are beyond your jurisdiction. In fact, if I'm not
17 mistaken, Panel 6, which is the panel that had to do
18 with an overview of the impacts - I think was the
19 general title - if I'm not mistaken, there are nine
20 volumes of transcript on that panel alone, and that is
21 not to mention all the evidence we've heard about
22 impact and effect that is included as part of most of
23 the other panels of evidence.

24 And I want to refer to the EA Document
25 itself, Exhibit 4. I have not included the excerpts,

1 but it's easily accessible I think to the Board. I
2 just want to refer to these as examples of express
3 allocation references in the central document filed by
4 the proponent. Page 5:

5 "The aim of the Ministry is to enter into
6 these agreements..." that is, forest
7 management agreements:

8 "...with the majority of the large
9 licence holders in the province. This
10 would have the result of placing about 70
11 per cent of the Crown lands licensed in
12 the province under FMAs, about 243,000
13 square kilometers."

14 If that is not allocation I don't know
15 what is. In fact, isn't the Ministry saying, haven't
16 they said their general purpose in being here is so
17 they can provide a proper funnel to allocate wood
18 resource to the industry? That is allocation.

19 One could say, if one uses the term
20 allocation broadly, that there is barely anything that
21 has been before this Board from the first day that
22 hasn't had to do with allocation because the whole
23 object of the proponent's exercise is to allocate wood
24 resource to the industry.

25 I'm not standing here and saying it

1 shouldn't be, I'm just saying that is what they have
2 been here doing. Now, why can't someone else stand up
3 and say: We want some allocation to us. Is that
4 beyond your jurisdiction? I think it is bizarre to
5 propose that it is.

6 At page 29 of the EA Document itself, the
7 text practically gushes about how the forest products
8 industry is vital to the economic and social well-being
9 of the province and in particular northern Ontario, et
10 cetera, et cetera, and there has been a lot of evidence
11 to that effect. If that is relevant, why would
12 evidence that communities of people living in the
13 forest who get no benefit; why is that not relevant?

14 MRS. KOVEN: Excuse me, Mr. Colborne,
15 what was the number of that gushing page?

16 MR. CASSIDY: Page 29.

17 MR. COLBORNE: Page 29.

18 MRS. KOVEN: Thank you.

19 MR. COLBORNE: I would also like to read
20 a brief passage from the summary of the industry
21 evidence. I don't know if it's been filed, quite
22 possibly not.

23 MR. CASSIDY: It hasn't.

24 MR. COLBORNE: But just on one sentence,
25 if I may. This is the industry's description, their

1 outline of their second panel:

2 "It will describe the structure of the
3 forest products industry, its economic
4 and social contributions to communities
5 in northern Ontario and Ontario as a
6 whole and socio-economic impacts of the
7 forest products industry."

8 You will be hearing that. I won't be
9 standing up and saying you can't hear that. Now, why
10 is the proponent standing up and saying you can't hear
11 similar evidence about the communities that I
12 represent?

13 MR. FREIDIN: I'm not saying you can't
14 call evidence about the community. I think what is
15 being missed here, Mr. Chairman --

16 MR. COLBORNE: I'm not sure if it's time
17 for Mr. Freidin to make his responding remarks.

18 THE CHAIRMAN: Mr. Colborne, we'll listen
19 to you and we'll hear from Mr. Freidin at the
20 appropriate time.

21 MR. FREIDIN: I apologize, Mr. Colborne.

22 MR. COLBORNE: At page 56 of the EA
23 Document it says:

24 "In general, timber management activities
25 have considerable positive effects on the

1 socio-economic environment such as
2 opportunities for direct and indirect
3 employment, provision of wood and wood
4 products to commercial markets, .
5 generation of revenues and contribution
6 to community stability."

7 But the wording there isn't all that
8 important, we heard evidence on that, but if that is
9 relevant, evidence to the contrary in respect of
10 certain communities is also relevant.

11 Now, what may be bothering Mr. Freidin is
12 the distinction between impacts and allocation. I
13 don't want to spend a lot of time talking about that,
14 because I don't quite know exactly where one would draw
15 the line. But the impact of an activity is clearly
16 relevant. Now, can you distinguish that as sort of a
17 broad area of concern from allocation? I submit that
18 they are hopelessly overlapping.

19 I want as well to refer to one page from
20 the Panel 6 evidence which is an addition to the pages
21 that Mr. Hunter referred to, and my reference is to the
22 paging in the filed evidence book and that is page 166.

23 THE CHAIRMAN: Mr. Colborne, just going
24 back for one moment. Is there, in your view, a
25 difference between the impacts from the activity, say

1 harvesting to use an example, and the impacts arising
2 from the allocation which, in turn, determines who
3 carries out that activity?

4 MR. COLBORNE: Yes, there is. I think
5 that they would be hard to totally separate, but there
6 is a difference, that I accept. But, Mr. Chairman,
7 don't forget that if you take the four points that Mr.
8 Freidin never fails to remind us of - access, harvest,
9 renewal, maintenance - you still only have a pile of
10 logs beside a logging road. They haven't gone
11 anywhere, nobody's done anything with them, nobody has
12 made a buck from them except the people who are
13 employed cutting them and so on. It's a long way from
14 there to an impact.

15 But the suggestion is that we can't look
16 at that, you know, that stretch of logic as it were.
17 And so the direct effect, the cutting that may cause
18 damage to - and one of the communities that I
19 represent - is one thing, because that arises directly,
20 for instance, out of the harvest activity, but an
21 indirect effect down the road when that pile of logs
22 has gone through the process that we will be hearing
23 about, I think, one could call it equally an impact,
24 but it falls more into the category of allocation at
25 that time, but still they are overlapping concepts.

1 And if we restricted consideration in an
2 environmental assessment hearing only to the physical
3 problem: Does cutting this tree cause a problem right
4 here on this little patch of land? If we restricted
5 impact to that kind of definition, then I think the
6 provisions of the statute would not be -- it would not
7 be consistent with the broad terms of the statute nor
8 with what I understand to be the usual approach of this
9 Board.

10 I said, Mr. Chairman, I was going to
11 refer to page 166 from Panel 6. Here the proponent is
12 saying through its witness that there are Indian land
13 rights - at least that is the way I read it - and if
14 the proponent can say that, surely the Indians who are
15 being referred to can bring some evidence in the same
16 regard.

17 I would like to read parts of three
18 paragraphs. I apologize, I don't have a copy of it
19 before me, I only have my own notes.

20 "Notwithstanding the fact that treaty and
21 aboriginal rights have not been clearly
22 defined, there can be little doubt that
23 however they are defined those rights
24 will in some way relate to access,
25 ordinary, preferred or exclusive, to

1 Crown land and natural resources."

2 So the proponent is saying there is no
3 doubt that it exists. Continuing:

4 "Given that this hearing is intended to
5 assess the manner in which the
6 Crown, Ontario, manages timber on Crown
7 lands in Ontario pursuant to provincial
8 legislation uncertainty surrounding
9 aboriginal and treaty rights could have
10 impact upon the final order of the
11 Board."

12 This is the proponent's witness.

13 Continuing:

14 "The purpose of this part of the evidence
15 therefore is to outline the manner in
16 which treaty and aboriginal rights have
17 been interpreted to date to define the
18 issues which remain unresolved and to
19 advise the Board on the impact which such
20 rights may have on the undertaking."

21 And then following from that, the
22 proponent's own witness proceeded to give his
23 interpretation of Indian entitlement.

24 Now, it seems that the present motion is
25 intended to prevent my witnesses from doing what the

1 Ministry of Natural Resources has already done. Both
2 sides must be heard, or: What is sauce for the goose
3 is sauce for the gander.

4 The proponent has taken the time of this
5 Board to hear everything the Ministry wanted to say
6 about allocation of the resource and the terrific
7 benefits following from it. Therefore, my submission
8 is that other parties have the right to call similar
9 evidence.

10 THE CHAIRMAN: Good time for a break?

11 MR. COLBORNE: I am getting close. Well,
12 I'm very nearly finished, yes.

13 THE CHAIRMAN: All right.

14 MR. COLBORNE: Just a few additional
15 words, Mr. Chairman, on cross-examination.

16 I said earlier that what was properly the
17 subject of cross-examination may be a little different
18 from what is properly the subject of evidence which may
19 be a little different from what could be included in an
20 order.

21 Now, the basic right is in the Statutory
22 Powers Procedure Act, Section 10(c) which states that
23 a party may:

24 "...conduct cross-examinations of
25 witnesses at a hearing reasonably

1 required for a full and fair disclosure
2 of the facts in relation to which they
3 have given evidence."

4 I have included in my book of authorities
5 at page 36 your comment on that from your text, Mr.
6 Chairman, paragraph 3.135:

7 "The Environmental Assessment Board and
8 the Joint Board are of the view that
9 cross-examination is an essential element
10 of the hearing process, particularly
11 where many of the issues involved are
12 technical or scientific matters. It is
13 often crucial where conflicting views and
14 opinions are expressed for the Board and
15 the parties to have the opportunity to
16 pose the "hard" questions in order to
17 arrived at an informed decision."

18 The next page of the authorities book
19 includes your paragraph 3.137, the first sentence of
20 which reads,

21 "Cross-examination is not necessarily
22 confined to only matters raised in-chief
23 and a wide latitude is usually permitted
24 by the Board provided that the questions
25 are within the limits of relevancy."

1 My general submission is that relevancy
2 is the test.

3 I have included in the book of
4 authorities the Township of Innisfil case, which I'm
5 sure you have referred to you a number of times, and
6 only for purposes of the treatment of the
7 cross-examination question in that case which appears
8 at pages 53 and 54 of the book of authorities.

9 This is a case which addressed many
10 complicated issues. One of them was whether or not
11 cross-examination would be permitted, and rather than
12 take time now, because I believe that all of the
13 members of the panel before whom I stand have looked at
14 this case at one time or another, I would just ask you
15 to read the paragraphs at the bottom of page 53 and the
16 top of page 54.

17 It's trite law - and perhaps I shouldn't
18 even have bothered bringing a case - it's trite law
19 that natural justice requires, in the context of a
20 hearing, a full right of cross-examination; failure to
21 afford such a right would be a jurisdictional error.

22 And some of the topics that I want to
23 cross-examine this panel, that is Panel 17 on, are
24 rather broad, but I can't think of where one raises
25 broad questions if it's not before a panel that is

1 looking at alternatives. And if the panel can't answer
2 them they can just say so.

3 If Mr. Freidin thinks the question is
4 improper for any reason under the rules of evidence as
5 they are usually applied by this Board, he can rise and
6 object.

7 I don't like in cross-examination raising
8 questions which are not proper, I don't think any
9 counsel, or very few do, and the usual dynamics of a
10 hearing, I submit, are sufficient to satisfy the kinds
11 of concerns that Mr. Freidin was expressing at the
12 earlier hearing.

13 I have included in this book though a
14 couple of things which I think also have significance
15 to the issue before you. First of all, a case called
16 the City of Thunder Bay Theatre Auditorium Complex
17 case. At page 66 of the authorities book it says, and
18 this is the Ontario Municipal Board speaking --

19 THE CHAIRMAN: This is actually I think
20 the Joint Board speaking; is it not?

21 MR. COLBORNE: Oh, excuse me, yes. Oh,
22 well, the Environmental Assessment Board.

23 THE CHAIRMAN: Sorry, it is the EAB, it
24 wasn't the Joint Board.

25 MR. COLBORNE: Yes. I think I was misled

1 by the fact that it's reported in the OMBR. So it is
2 the Environmental Assessment Board.

3 This concerned the very building that
4 many of us visit from time to time here in Thunder Bay.
5 At page 66 of my book, the end of the second last full
6 paragraph, the Board says:

7 "Non-structural alternatives considered
8 but rejected by the proponent were City
9 participation versus non-participation
10 and the no go or do nothing alternative."

11 One of Mr. Freidin's concerns was, why
12 did I say that alternatives looked at by Panel 17 might
13 include more or less government participation. Well,
14 here is a panel of this Board commenting in a recent
15 case about the fact - and commenting positively, I
16 suggest - that the proponent looked at the merits of
17 who would own and who would not own the undertaking
18 that was before them.

19 And again at the top of the next page,
20 page 67, to the same effect:

21 "Municipal participation was considered
22 by the proponent to be essential..." et
23 cetera. Partway down the same page:

24 "The Board, in reviewing this evidence,
25 acknowledges that the City participation

1 is desirable..." and so on.

2 One last point I wanted to make from this
3 case is at page 69 of my book, the last three lines
4 before the heading: Impact of vehicular traffic:

5 "The Board is satisfied that a thorough
6 analysis of all the positive and negative
7 features associated with each site was
8 undertaken by the proponent."

9 A thorough analysis. I'm going to be
10 referring in a minute to some other authorities on the
11 question of alternatives and I wanted to point out to
12 you that phrase 'thorough analysis' which appears
13 there, because I'm going to be taking the position in
14 regard to Panel 17 that a thorough analysis is exactly
15 what is missing, and that is why I want to ask some of
16 the broad questions that I proposed.

17 Going further into my book I included -
18 and maybe this is a little bit out of order - this is a
19 case it, starts at page 75 of the book, which I have
20 literally found yesterday because it was referred to in
21 a bulletin which I subscribe to, The Natural Resources
22 such and such bulletin. Perhaps the Board is more
23 familiar with it, it is a Supreme Court of Canada case
24 from 1981, but it does not appear in any of the usual
25 case reports.

1 The citation I found was Alberta Reports
2 and what I have excerpted here is from the Canadian
3 Native Law Reports. Neither are case reports that are
4 found in most libraries, but nevertheless it is the
5 Supreme Court of Canada speaking on points which are
6 not dissimilar to what is before you now. I want to
7 stress though that they are not identical either.

8 What we had here was one of the tar sands
9 projects, and from my reading of the reasons in the
10 Supreme Court of Canada this is what happened: The tar
11 sands project was being assessed under at least two
12 Alberta environmental statutes, it seems that all the
13 parties thought that it would be probably a good idea
14 if there was some affirmative action planned for the
15 Indians in the area, but when the decision came out
16 that action was not -- or that was not in the
17 recommendation or whatever it was that this Board
18 produced. Now --

19 THE CHAIRMAN: Was it before the ERCB?
20 Who was it before; do you know?

21 MR. COLBORNE: Alberta Energy Resources
22 Conservation Board. Now, maybe I'm reading between the
23 lines, but I think I'm right and I think you would
24 agree with me if you read the full text of this, it
25 looks like the Board that was sitting there was

1 advised, probably by their own counsel, that they can't
2 make this affirmative action type of order that the
3 panels didn't seem to be opposed to, can't make it
4 because it offended a certain Alberta statute that was
5 in force at that time, some kind of human rights type
6 of statute. So it was not in the order.

7 The Indians then appealed through the
8 court process - it looks like it went first somewhere -
9 anyways, it was in the Alberta Court of Appeal before
10 obviously going to the Supreme Court of Canada, but at
11 the earlier levels the attention was focused on whether
12 that Alberta statute excluded the ability of some kind
13 of affirmative action program being part of the order,
14 and it was only when it got to the Supreme Court of
15 Canada that that sort of side issue was out the window,
16 partly because the Act had been repealed or amended,
17 and partly because the Supreme Court of Canada, or at
18 least the majority - I may be reading it so quickly I
19 might not have this exactly right - but said: No, that
20 is a wrong interpretation of that Alberta statute so,
21 therefore, we can go right back to square one and think
22 about whether this Board could have made the
23 affirmative action type of order that was contemplated,
24 and the Supreme Court of Canada said no, but they said
25 it in very narrow terms.

1 At page 80 of the book we have the list
2 of purposes of one of the statutes that the Alberta
3 Board was operating under, and at page 81 we have the
4 list of purposes for the other statute that the Board
5 was operating under. Then when you get to page 83, I
6 think this is the ratio of the case, the Supreme Court
7 of Canada says that in view of those purposes, the
8 purposes in those statutes, the Board didn't have the
9 power to make the kind of order that was contemplated.

10 And I will just read the operative
11 section. This is at page 83, the paragraph in the
12 middle of the page, starting one line down:

13 "The Board's jurisdiction is governed and
14 controlled by the statutes to which I
15 have referred and in conformity with the
16 purposes for which these statutes were
17 enacted. That jurisdiction is limited to
18 the regulation and control of the
19 development of energy resources and
20 energy in the Province of Alberta. The
21 powers with which the Board is endowed
22 are concerned with the natural resources
23 of the area rather than with the social
24 welfare of its inhabitants..." and so on.
25 Now, going on to the top of the next

1 page, page 84:

2 "In reaching the above conclusion I have
3 not overlooked the argument of the
4 appellant to the effect that the
5 references to the public interest are of
6 themselves a sufficient indication..."

7 and so on.

8 So I don't know, Mr. Chairman, whether
9 this case helps or hurts me. I'm asking you to read it
10 because it does have some similarity to what is before
11 you now. But I must stress that the purpose sections
12 of the statutes that were before the courts in that
13 case are very narrow compared with the purpose section
14 and the definition section of the statute which governs
15 this particular hearing.

16 Now, one final reference in my book of
17 authorities. I have excerpted some passages from
18 Professor Emond's book, 1978 I fear, but I'm told - and
19 somebody here will correct me if I'm wrong - that this
20 part of the book that has to do with U.S. jurisprudence
21 on alternatives is not out of date. I hope I'm right
22 on that because I stuck my neck out and included it in
23 my book.

24 Beginning at page 88 I have highlighted
25 some portions in the book that you have, Mr. Chairman.

1 "The American experience with the word
2 alternatives is remarkable both for the
3 frequency with which the interpretation
4 of the word has been litigated and the
5 interpretation attached to it by the
6 courts."
7 A little further down:
8 "The leading case is Natural Resources
9 Defence Council and Morton."
10 Top of page 89:
11 "The court ruled that the federal agency
12 is required to discuss all reasonable
13 alternatives even those alternatives
14 which are beyond its power to implement."
15 Further on the same page:
16 "The court reasoned that even if the
17 agency itself could not implement the
18 proposed alternative, its impact
19 statement will be read by someone who
20 can..."
21 Well, I shouldn't forget this:
22 "The court emphasized that its rule was a
23 "rule of reason."
24 The next page:
25 "The mere fact that an alternative

1 requires legislative implementation does
2 not mean that it does not have to be
3 discussed as an alternative. The court
4 concluded by stating that the requirement
5 of alternatives is subject to the
6 construction of reasonableness. So long
7 as the agencies have taken the hard look
8 at environmental consequences mandated by
9 Congress, the court does not seek to
10 impose unreasonable extremes or interfere
11 in the area of executive discretion.
12 Although this decision has been
13 criticized, it has been followed in
14 dozens of cases, and apparently
15 incorporated into the Federal
16 Regulations."

17 And there is set out apparently what is
18 still in the federal regulations:

19 "Alternatives..." have to include:
20 "...a rigorous exploration and objective
21 evaluation of the environmental
22 impacts..." and so on.
23 "The U.S. Courts have generally followed
24 the philosophy expressed in Morton..."
25 "The courts also emphasize that the

1 alternatives section must not be used as
2 a sham to justify a decision that was
3 made before the impact statement was
4 written."

5 The alternatives treatment cannot be
6 merely paperwork to justify a project that has already
7 been put in train.

8 "It is not enough..." this is page 93:
9 "...that the agency merely lists
10 alternatives to the proposed action, the
11 agency must discuss these alternatives
12 and explain its analysis and reasoning."

13 And at page 95, Professor Emond points
14 out that when one compares Section 5(3) of the Ontario
15 Act with its U.S. counterparts, it's clear that the
16 Ontario Act is more broadly framed, it envisages more
17 analysis and calls for a more comprehensive assessment
18 of its alternatives. I'm not suggesting for a minute
19 that U.S. law binds this Board, but I thought that that
20 treatment was relevant.

21 Those are my submissions. I'm asking
22 that the motion be refused.

23 I don't know if you want any submissions
24 on the second motion because I'm not sure what Mr.
25 Freidin's position on it was.

1 MR. FREIDIN: I effectively have
2 withdrawn that motion, Mr. Chairman. I don't have to
3 hear any submissions.

4 MR. COLBORNE: Thank you.

5 THE CHAIRMAN: Thank you, Mr. Colborne.

6 It's been a long morning. I think we are
7 going to adjourn for the lunch hour and I think, in
8 view of the submissions this morning, we will take an
9 hour and a half.

10 I'm not sure whether we are going to get
11 to evidence today based on what is yet to come.

12 Mr. Lindgren, you are going to be...?

13 MR. LINDGREN: Again, 20 to 30 minutes.

14 THE CHAIRMAN: 20 to 30 minutes.

15 Another 20 minutes, Ms. Seaborn?

16 MS. SEABORN: Approximately, Mr.

17 Chairman. Certainly not longer than 20 minutes.

18 THE CHAIRMAN: Mr. Edwards, we didn't
19 call on you earlier.

20 MR. EDWARDS: No submissions today, Mr.
21 Chairman.

22 THE CHAIRMAN: No submissions.

23 MR. CASSIDY: Five minutes.

24 THE CHAIRMAN: Mr. Cassidy, five minutes.
25 And can you give us an idea?

1 MR. FREIDIN: 45 minutes to an hour.

2 THE CHAIRMAN: Well, I think after lunch,
3 that will probably get us close to around 5:00.

4 I think it would probably be in order to
5 dismiss the panel for today, commence tomorrow.

6 Very well. We will come back at a
7 quarter to three.

8 ---Luncheon recess taken at 1:20 p.m.

9 ---On resuming at 2:50 p.m.

10 THE CHAIRMAN: Thank you. Be seated,
11 please.

12 You are next, Mr. Lindgren?

13 MR. LINDGREN: Apparently so.

14 Mr. Chairman, like Mr. Hunter we are very
15 concerned about the potentially broad scope of this
16 motion if it is in fact granted by the Board and, for
17 that reason, we support the position of Mr. Colborne
18 and Mr. Hunter in this matter and we would respectfully
19 request that this motion be dismissed by the Board and,
20 as I will explain in a few moments, Mr. Chairman, it is
21 our view that the Board does have the jurisdiction to
22 make orders respecting licences, permits and approvals
23 related to the undertaking.

24 It is also our position, Mr. Chairman,
25 that the Board does have the authority to make orders

1 respecting the structure of the current licensing
2 scheme to deal with issues concerning the allocation of
3 the benefits of the timber resource and to deal finally
4 with the specific matters set out in paragraphs 1 to 5
5 of the Ministry's Notice of Motion.

6 We agree with Mr. Hunter and Mr. Colborne
7 that the Board can hear and indeed has heard some
8 evidence on these matters already. It's not my
9 intention to review the evidence, suffice it to say
10 that, in our view, Mr. Colborne and Mr. Hunter have
11 both referred to the relevant portions of the evidence
12 that bear out that proposition.

13 And because, Mr. Chairman, these matters
14 have been addressed to some extent by the proponent, we
15 submit that the Board must allow cross-examination on
16 these matters and, most importantly, we submit that the
17 Board can impose terms and conditions related to these
18 matters.

19 Now, I will be brief, Mr. Chairman. I
20 will attempt not to unduly repeat the submissions made
21 earlier by my friends.

22 Let me begin by referring to Section 9 of
23 the regulation, since this section is central to Mr.
24 Freidin's motion. In our respectful submission, sir,
25 Section 9 cannot bear the interpretation that Mr.

1 Freidin seeks to place upon it. We agree with Mr.
2 Hunter and Mr. Colborne that the section is not broad
3 enough or specific enough to limit the Board's
4 jurisdiction over the whole range of matters set out in
5 the Notice of Motion.

6 In our submission the section has a quite
7 narrow function, which is to exclude certain individual
8 transactions from the ambit of the Environmental
9 Assessment Act where those transactions do not result
10 in any environmental consequences. I will return to
11 this in a moment.

12 We submit that a plain reading of Section
13 9 clearly suggests that the granting of an individual
14 licence to a particular company is not normally subject
15 to environmental assessment. In other words, before a
16 government official can issue a specific licence he or
17 she does not have to prepare and submit an
18 environmental assessment package, as it were, in
19 accordance with the legislation.

20 Mr. Chairman, this interpretation is
21 consistent, we believe, with the language of the
22 section and it's not my intention to repeat or read in
23 the section - that has already been done - but we do
24 read it in the same manner as Mr. Colborne and Mr.
25 Hunter; and, that is, it's quite narrow, it's limited

1 to the undertaking of making a loan, giving a grant,
2 issuing or granting a licence, a permit, an approval, a
3 permission or a consent.

4 In our submission, Mr. Chairman, this
5 provision, Section 9, is clearly directed towards
6 individual licences or approvals, it is intended to
7 exclude only specific licences or particular approvals
8 that have no environmental consequences.

9 THE CHAIRMAN: Mr. Lindgren, stopping
10 there for a moment. What force in effect in your
11 submission does this EA Update Document have vis-a-vis
12 the interpretation of Section 9 of that regulation or
13 indeed of the other sections?

14 MR. LINDGREN: As with the comments of
15 any drafters of legislation, this kind of commentary I
16 think the Board can have regard for, but is not
17 necessarily bound by it. In any event, I'm not placing
18 any reliance on the interpretation of Section 9 offered
19 by the document filed by Mr. Freidin.

20 THE CHAIRMAN: No. Well, I was more
21 interested in the portion of the document that refers
22 to the fact of whether or not there is a significant
23 impact.

24 That kind of wording or phraseology does
25 not appear in the regulation section itself, it is an

1 interpretation by presumably somebody in the EA Branch
2 or whoever was responsible for preparing this document.
3 And the reason I'm asking that is because of your
4 comment a few moments ago, wherein you indicated that
5 an official, before he signs a licence or issues a
6 permit, normally is not required to complete an
7 environmental assessment.

8 That may be the case in terms of it being
9 outside the Environmental Assessment Act, unless that
10 particular licence in question would have significant
11 environmental effects if one pays any credence to that
12 explanatory statement in this EA Update, that is what
13 I'm saying.

14 MR. LINDGREN: As I have indicated, Mr.
15 Chairman, I think the Board should have regard to that
16 and in fact it may ultimately decide to adopt that
17 interpretation. Parliamentary history such as that is,
18 not necessarily binding on the Board as you may know,
19 but is certainly something that reveals the intent of
20 the drafters when they put into place Section 9.

21 I think it gives a clue perhaps as to the
22 scope and extent of the extension that is granted or
23 conferred by Section 9.

24 THE CHAIRMAN: All right. I'm just
25 wondering though where else the Board gets guidance as

1 to an interpretation of Section 9 vis-a-vis the
2 question of whether the impacts may or may not be
3 significant with respect to a particular licence or
4 permit?

5 MR. LINDGREN: I think that guidance
6 comes from two sources; one Section 10. Section 9, in
7 my submission, has to be read in conjunction with
8 Section 10 and once we have done that, then all of the
9 applicable provisions of the Environmental Assessment
10 Act come to bear, and I think that is where the
11 determination of significant environmental effects
12 comes into play.

13 THE CHAIRMAN: But isn't that a chicken
14 and egg situation?

15 MR. LINDGREN: I don't believe so, sir.

16 THE CHAIRMAN: What I'm suggesting is, is
17 that you don't get to Section 10 unless an EA was
18 required in the first place, and how do you determine
19 whether an EA was required in the first place if you
20 look at Section 9, where it indicates that with respect
21 to a specific permit or grant it may be exempted from
22 the EA Act? How do you tie that together?

23 MR. LINDGREN: Well, Mr. Chairman, my
24 submissions flow from a question that you put to one of
25 my friends earlier, and that is: Does the statute ever

1 apply to a particular licence that may have
2 environmental consequences? I think the question was
3 put to Mr. Colborne, and Mr. Colborne's response was
4 that: Yes, in theory, if a particular licence does
5 result in an environmental impact then perhaps the full
6 scope and force of the Environmental Assessment Act
7 applies to that undertaking.

8 An example that I thought of that might
9 illustrate the potential for a particular licence to
10 have those kind of effects is the matter involving the
11 allocation of a large tract of land to the Reid Company
12 some number of years ago which spawned, as you know,
13 the Fahlgren Commission. I think that is an example of
14 a particular licence or allocation decision that does
15 have or did have significant environmental effect, and
16 for that reason --

17 THE CHAIRMAN: Yes, but stepping back one
18 second, Mr. Lindgren, the problem is: Who determines
19 whether or not there shall be an environmental
20 assessment with respect to a particular licence?

21 The reason I ask that is: If somebody
22 goes along, an official, and signs or grants a licence,
23 makes an allocation in the normal course thinking that
24 they don't require an environmental assessment and
25 relying on Section 9 of this regulation and it turns

1 out later on that there is some significant
2 environmental impact as a result of that allocation, is
3 not the effect of not having submitted an environmental
4 assessment contrary to the Act, if in fact the
5 exemption provision did not apply, render the
6 allocation invalid; it didn't comply with the Act,
7 therefore, it's of no legal force and effect?

8 MR. LINDGREN: That may well be the
9 consequence of an undertaking that does not fall within
10 the narrow exemption conferred by Section 9.

11 I would think at first instance the
12 matter would go to the Minister of Environment for his
13 considered thought. Ultimately if a person thought
14 that a particular undertaking did not enjoy the
15 protection of Section 9 and yet the undertaking was
16 being proceeded with, I would think that one possible
17 option would reside in the courts.

18 THE CHAIRMAN: Well, is that the
19 practice; is it the practice every time an allocation
20 or licence is granted that it's submitted to the
21 Minister of the Environment?

22 MR. LINDGREN: That is not my
23 understanding that is the practice.

24 THE CHAIRMAN: So once again these things
25 are done de facto and if in fact there is a significant

1 impact resulting therefrom, then supposedly after the
2 fact one could argue that since an EA wasn't done,
3 since this exemption section did not apply - that is,
4 if one takes the interpretation as provided in the EA
5 Update - then the licence itself may in fact be
6 invalid, it's contrary to the Act. But I guess what
7 I'm asking is: Who determines all that, assume there
8 is no hearing, assume it's not before the Board.

9 MR. LINDGREN: I would just have to
10 repeat my earlier submission and; that is, one forum in
11 which that issue could be determined would be the
12 courts. A court could declare whether or not a
13 particular undertaking falls within or without that
14 particular exemption. That would be one course of
15 action, Mr. Chairman. I'm not sure if that's a full
16 answer, but that is certainly one option.

17 In any event, I think it's our submission
18 that Section 9 was not intended to exclude licensing
19 per say or the underlying policies behind a licensing
20 regime or a licensing scheme where these regimes are
21 related to or are necessary to an undertaking that is
22 subject to environmental assessment.

23 With respect to Mr. Freidin, we submit
24 that his interpretation of Section 9 goes much further
25 than what was intended by the drafters of Section 9.

1 We suggest that if the drafters had intended to exclude
2 licensing per se altogether from the Act, then they
3 could have and should have done so in clear and
4 unambiguous language. For example, the section could
5 have read:

6 "The licensing, permit, issuing or
7 loan granting are exempt from the
8 provisions of the Environmental
9 Assessment Act."

10 Or, more specifically, the section could
11 have provided that:

12 "The licensing, permit, issuing or loan
13 granting carried out under the auspices
14 of the Ministry of Natural Resources are
15 exempt from the Act."

16 That is not what the section says, Mr.
17 Chairman. The section merely provides in essence that
18 the making of a loan or the issuance of a permit does
19 not normally require the preparation of an
20 environmental assessment as per Section 5(1) of the
21 Act.

22 We respectfully submit that Mr. Freidin's
23 reliance and interpretation on this section is
24 unreasonable on the facts and in the law; moreover, if
25 the Board does give effect to Mr. Freidin's

1 interpretation, if the Board does extend the scope of
2 Section 9 to the matters listed in the Notice of
3 Motion, we submit that this would amount to an
4 amendment of Section 9 and it would be an amendment
5 that is inconsistent with the object and intent of the
6 section and the regulation read as a whole.

7 As I have alluded to earlier, Mr.
8 Chairman, we submit that such an extention would be
9 inconsistent with the object and intent of Section 10
10 of the regulation.

11 Now, as was pointed out this morning,
12 Mr. Chairman, that is a submission of Mr. Colborne and
13 Mr. Hunter, that Section 9 and Section 10 should be
14 read together, and we support that submission and, in
15 our view, this submission is supported by the
16 legislative history of Section 10.

17 Now, Mr. Freidin has filed the 1976 EA
18 Update and that update reproduces, in its entirety, the
19 original general regulation. But, Mr. Chairman, you'll
20 note that the current version of Section 10 does not
21 appear in that regulation and, in fact, the current
22 version of Section 10 was not enacted until four years
23 later. It was not enacted until the passage of Ontario
24 Regulation 8 of 1980.

25 Now, I have copies of that, I have

1 distributed that to the parties and I would like to
2 file with the Board at this time.

3 THE CHAIRMAN: Very well.

4 MR. LINDGREN: (handed)

5 The provision I'm referring to, Section
6 9(a), is found halfway through the right-hand column.
7 That is in fact the present version of Section 10. But
8 you will note, Mr. Chairman, that it was originally
9 enacted as Section 9(a).

10 In our view, Mr. Chairman, this is
11 significant because it's suggested that the drafters of
12 the regulation saw a link between the two sections and
13 that they intended Section 9 and 9(a) to be read
14 together.

15 In fairness, Mr. Chairman, I should point
16 out that when the regulation was consolidated later
17 that year in the Revised Regulations of Ontario, 1980,
18 these sections were broken into two separate sections.
19 Nevertheless, we submit the history of Section 10;
20 namely, its original enactment as Section 9(a), is
21 significant and it reaffirms the view that Section 10
22 was specifically intended to speak to the scope of the
23 exemption created by Section 9 and that the sections
24 were intended to be read together.

25 Now, it's not my intention to read into

1 the record the provisions of Section 10, I believe that
2 has already been done. Section 10 essentially provides
3 that:

4 "Notwithstanding any exemption under the
5 regulation, all provisions of the Act
6 apply once an environmental assessment of
7 an undertaking is submitted."

8 Reading this with Section 10, Mr.
9 Chairman -- or Section 9, we submit that Section 10
10 means that once an environmental assessment of an
11 undertaking is submitted and that undertaking directly
12 or indirectly involves matters such as licensing or
13 permit issuing, then all provisions of the Act apply
14 with respect to that undertaking and the related
15 matters.

16 Now, this means, Mr. Chairman, that the
17 broad definition of environment applies; this means
18 that the wide definition of undertaking applies; and it
19 means that the purpose section applies in Section 2; it
20 means Section 5(3) applies and, most importantly, if
21 the matter is referred to the Board, then the Board's
22 broad powers under 12(2) of the Act come into play.

23 THE CHAIRMAN: Can I just ask a question
24 to get the sequence firmly in my mind?

25 When the regulation was first enacted it

1 contained Section 9. Did it contain Section 9(a) as
2 well?

3 MR. LINDGREN: No, it did not.

4 THE CHAIRMAN: That came four years
5 later?

6 MR. LINDGREN: That's correct.

7 THE CHAIRMAN: And that came as 9(a)?

8 MR. LINDGREN: That's correct.

9 THE CHAIRMAN: Then when there was a
10 consolidation 9(a) became 10?

11 MR. LINDGREN: That's correct.

12 THE CHAIRMAN: But there is no change in
13 the wording between 9(a) and what is now presently
14 Section 10?

15 MR. LINDGREN: No, sir.

16 THE CHAIRMAN: Okay.

17 MR. LINDGREN: Now, as I have submitted,
18 Mr. Chairman, Section 10 provides that once the EA is
19 submitted all provisions of the Act apply.

20 Putting all that together, Mr. Chairman,
21 and with reference to 5(3) the Board, in our view, is
22 authorized to examine the full range of environmental
23 effects caused by the undertaking by the preferred
24 means, the carrying out of the undertaking and by
25 alternatives to the undertaking.

1 And where, for example, Mr. Chairman, the
2 Board finds that the socio or economic effects of the
3 undertaking or the preferred means of carrying out the
4 undertaking are detrimental to some or all of the
5 people or communities of Ontario, then the Board
6 clearly can do one of two things, as you indicated
7 earlier this morning: First, it can deny approval to
8 proceed with the undertaking or, secondly, it can
9 accept the environmental assessment, approve the
10 undertaking but attach terms and conditions to the
11 approval that address these adverse impacts or effects.

12 And as the Divisional Court has stated in
13 the Ontario Hydro case provided by Mr. Colborne, the
14 Board does have the jurisdiction under Section 12 to
15 require the proponent to carry out the undertaking via
16 a method not preferred or even considered by the
17 proponent. And this point really turns on an
18 interpretation of what is the undertaking in the case.

19 Now, as you know, Mr. Chairman, the word
20 undertaking is defined in the Act, it's defined in
21 Section 1(0), and this reads in part:

22 "Undertaking means an enterprise or
23 activity or a proposal, plan or program
24 in respect of an enterprise or activity
25 by or on behalf of Her Majesty in right

1 of Ontario by a public body or public
2 bodies or by a municipality or
3 municipalities..." and it goes on to
4 speak to the private sector.

5 In our view, Mr. Chairman, and having
6 regard to that broad definition of undertaking, we
7 submit that the undertaking proposed by the Ministry is
8 an all-encompassing activity that includes not only the
9 planning of the physical acts of access, harvest,
10 renewal and maintenance, but it also must include -- it
11 must be taken to include the preferred means of
12 implementing those activities in the area of the
13 undertaking.

14 Now, on this point, Mr. Chairman, my
15 notes indicate that this morning Mr. Freidin referred
16 to licensing as a means of facilitating the
17 implementation of timber management activities, and we
18 agree with Mr. Freidin on this point. We submit that
19 the establishment of different types of management
20 units or the use of different licensing regimes are
21 methods to implement timber management activities on
22 certain lands at certain times and under certain
23 conditions.

24 In other words, Mr. Chairman, individuals
25 or companies cannot undertake any of these activities

1 in a given area of Crown land unless he or it receives
2 a government licence or approval of some sort.
3 Therefore, in a very real sense, the licensing regime
4 and the underlaying policies and procedures clearly and
5 directly control where an environmental effect of
6 timber management will occur, it will control when the
7 effect will occur, it will control how long the effect
8 will occur, and so on.

9 Mr. Chairman, licensing is not an
10 irrelevant or secondary matter to this undertaking.
11 The Ministry has proposed that a licensing regime is
12 essential to the undertaking and it is essentially a
13 means to carrying out the undertaking in our view.

14 Now, on this point I should stop and
15 indicate that we agree with Mr. Colborne's earlier
16 comment that a decision by the Board refusing approval
17 to proceed with the undertaking is, in fact, a decision
18 that does affect licensing, the licensing regime.

19 Mr. Freidin has acknowledged that if the Board refuses
20 approval to proceed, then the licensing or the licences
21 themselves are virtually meaningless.

22 In our view, this clearly indicates that
23 the Board can make an order that affects the licensing
24 regime. This is, in my view, a complete answer to Mr.
25 Freidin's motion.

1 Mr. Chairman, we are here to look at how
2 the government is managing the forest and, for their
3 part, the government and the Ministry have developed
4 various timber management policies such as the FPPO,
5 and a licensing scheme has been established to carry
6 out these policies. However, in our view, the
7 licensing scheme or regime itself is the product of
8 policy deliberations. For example, there is nothing
9 inevitable or necessary about the FMA regime. Timber
10 management could occur without that regime.

11 But in 1980 the government, rightly or
12 wrongly, decided that large tracts of Crown land in
13 northern Ontario will be licensed to large companies
14 and that these companies will be responsible for
15 carrying out certain activities on those lands.

16 The FMA regime exists to this day, as you
17 know, Mr. Chairman. It has been presented to this
18 Board as an effective means of implementing and
19 controlling timber management activities on certain
20 Crown lands. Mr. Hunter and Mr. Colborne have already
21 referred you to that evidence, and I don't intend to
22 review it at this time.

23 Suffice it to say that, in our opinion,
24 those issues have been squarely put before the Board
25 and the Board must allow examination and

1 cross-examination on the environmental effects of the
2 licensing regime, such as the FMA regime.

3 If I could take this one step further.
4 We have a government that has decided that a certain
5 amount of Crown timber will be harvested or that a
6 certain amount of area will be renewed or maintained.
7 Now, Mr. Chairman, this can't be done in the abstract.
8 Individuals or companies are required to go on to the
9 Crown land to extract the timber or to do the
10 replanting, but these persons or these companies cannot
11 do that legally until they receive some form of
12 approval or consent under the Crown Timber Act.

13 So, for example, under Section 6 of the
14 Act, FMAs may be entered into by the company then by
15 the Ministry. However, Mr. Chairman, if this Board
16 finds that the Ministry's reliance upon the FMA regime
17 results in adverse environmental impacts or adverse
18 social, economic or cultural impacts, then surely it is
19 open to this Board to revise or amend the regime as it
20 deems appropriate.

21 Now, you put a question to Mr. Colburne
22 or Mr. Hunter earlier this morning about whether or not
23 that would require legislative amendment, and we've had
24 this discussion before, Mr. Chairman. My position is
25 simply this: If a change to the FMA regime is

1 necessary and it requires a legislative amendment, then
2 we invite the Board to make the necessary
3 recommendations. If the change is required and the
4 change can be accomplished without a legislative
5 amendment, then we submit that the Board can and should
6 impose the appropriate terms and conditions in its
7 order and in its decision.

8 I should point out at this time, Mr.
9 Chairman, that this does not mean the Board has
10 jurisdiction to retroactively amend, abridge or abolish
11 existing FMAs or existing licences, that is not our
12 submission. However, we submit that it is open to the
13 Board to impose terms and conditions that address how
14 licences or approvals essential to the undertaking
15 shall be granted in the future or how they shall
16 operate in the future. Surely this Board can dictate
17 what future FMAs will look like, otherwise, what are we
18 doing here?

19 THE CHAIRMAN: What's the position if the
20 Board denied the application outright to existing FMAs?

21 MR. LINDGREN: Pardon me?

22 THE CHAIRMAN: What is the position,
23 vis-a-vis the carrying out of the activities, should
24 the Board deny the Ministry's application outright?

25 MR. LINDGREN: The legal consequence of

1 such an order, Mr. Chairman, is this: All timber
2 management activity has to cease forthwith.

3 THE CHAIRMAN: Regardless of whether or
4 not it's permitted under an FMA agreement of a
5 previously executed agreement?

6 MR. LINDGREN: I believe that is the
7 result, sir.

8 Now, Mr. Chairman, in reaching its
9 decision on this motion, we submit that the Board must
10 have regard for the purpose of the Environmental
11 Assessment Act which, as you know, is set out in
12 Section 2 of the legislation. I don't intend to read
13 the section but, in our view, it's clear that the
14 section provides that the public interest is paramount
15 in this proceeding.

16 It follows from this that the Board
17 cannot and should not approve of an undertaking or
18 means of carrying out an undertaking that adversely
19 affects the natural or socio-economic environment of
20 the people of the whole or any part of Ontario. The
21 Board must examine these socio-economic and cultural
22 impacts, and fundamental to this discussion, Mr.
23 Chairman, is a look at when, where and how long these
24 effects can occur, and this can only be done by
25 examining the Ministry's proposed licensing regime and

1 the underlying policies.

2 Now, Mr. Chairman, not only does the
3 Board have that jurisdiction, if not the duty; but, in
4 our respectful submission, the proponent too is obliged
5 by Section 5(3) to carry out such an examination. And,
6 in particular, Mr. Chairman, Section 5(3)(b) of the Act
7 requires the proponent to describe the undertaking,
8 alternative methods of carrying out the undertaking and
9 alternatives to the undertaking.

10 Section 5(3)(c) further requires a
11 description of the environment that might be affected
12 and a description of the environmental effects of the
13 undertaking, the alternative methods and the
14 alternatives to the undertaking.

15 And finally, and most importantly,
16 Section 5(3)(d) requires the proponent to evaluate the
17 advantages and disadvantages to the environment of the
18 undertaking, alternative methods and alternatives to
19 the undertaking.

20 Taken together, Mr. Chairman, these
21 provisions, in our view, impose a statutory obligation
22 on this proponent to describe and evaluate the social,
23 economic and cultural impacts that may result from the
24 undertaking; that is, the four activities, as well as
25 the effects that may result from the preferred and

1 alternative methods of carrying out that undertaking;
2 that is, the use of different or various licensing
3 regimes.

4 As Mr. Colborne has pointed out, we have
5 heard some evidence so far from the proponent on these
6 matters, and surely it is open to the other parties to
7 call their own evidence on those issues and to
8 cross-examine on those issues.

9 Some time ago, Mr. Chairman, the Board
10 received submissions from the parties on a related
11 issue; and, that is, the Board's jurisdiction to review
12 government or ministerial policies, procedures and
13 manuals related to the undertaking. And, as I recall,
14 the parties were in general agreement that there are no
15 provincial policies that are beyond the reach of this
16 Board. And this agreement was largely based on the
17 Supreme Court of Canada decision and the Township of
18 Innisfil and Township of Vespra which has been again
19 provided to the Board by my friend. In our view, it
20 follows from this agreement in this case that .
21 provincial or ministerial policies relating to timber
22 management licensing are open to review by this Board.

23 Those conclude my general comments on the
24 Notice of Motion. I would like to speak briefly to the
25 five specific matters set out toward the bottom of the

1 Notice of Motion.

2 In the first paragraph the Ministry
3 appears to contend that it is not within the
4 jurisdiction of the Board to determine if privately
5 owned forests constitute an alternative to the
6 undertaking.

7 Now, quite frankly, Mr. Chairman, we
8 don't understand the submissions since privately owned
9 forests or privately owned land form the basis of
10 alternative A submitted by the Ministry of Panel 17 as
11 an alternative to the undertaking. So I don't
12 understand the submission in the first place.

13 In any event, it is our submission that
14 in reaching its decision on how Crown timber should be
15 managed, the Board certainly should look at the nature
16 and extent of wood that may exist on private land and
17 let me provide a hypothetical situation to illustrate
18 that point.

19 If, for example, the evidence suggested
20 that there was an abundance of un-utilized or
21 under-utilized private wood, then the Board may well
22 order terms and conditions that reduce our reliance or
23 over-reliance on the Crown timber resource. In this
24 sense, there would be no need or less of a need to
25 carry out the undertaking on Crown land; and, in this

1 sense, the Board could well impose a limit on the
2 volume of Crown timber allocated because there are
3 alternatives available, there is private wood
4 available.

5 Now, this may be roughly analogous to the
6 Board reducing the proposed capacity or lifespan of a
7 landfill or public landfill because of the existence of
8 private or public waste management or waste reduction
9 policies that are being carried out in the area to be
10 serviced by the landfill. That is a rough analogy.

11 In any event, it is our submission the
12 Board does have the jurisdiction to determine if
13 privately owned forests are a reasonable alternative to
14 the undertaking.

15 Moving very quickly on to paragraphs 2
16 and 3. Here the Ministry contends that the Board
17 cannot determine whether or not FMAs or other licences
18 should be fewer in number or smaller in size or shorter
19 in term or duration. I've already spoken briefly to
20 this issue. Our position here is that licensing
21 matters related to timber management are reviewable by
22 this Board, and we submit that the Board does have the
23 jurisdiction to render a decision that orders or
24 recommends changes in the proposed licensing regime.

25 So if, for example, the evidence suggests

1 that FMAs or FMA units are too large or too unwieldy
2 for proper management, or that the evidence suggests
3 that the size of FMAs should be reduced so their
4 boundaries correspond with wildlife management units,
5 if the evidence suggests that, then clearly it's open
6 to the Board to impose a term and condition requiring
7 such change.

8 I note, Mr. Chairman, that in paragraph 3
9 there is a reference to Order-in-Council licences that
10 may be issued. Surely, Mr. Chairman, the practice of
11 issuing Order-in-Council licensing or licences is a
12 Cabinet policy related to timber management that is
13 reviewable by this Board. Neither Section 9 of the
14 regulation nor any provision of the Act limits or
15 precludes the Board's ability to prescribe how such
16 licences should be issued in the future or what they
17 should contain. This is a policy related to timber
18 management and certainly not beyond the reach of this
19 Board.

20 THE CHAIRMAN: Would you be contending
21 that a specific licence might be?

22 MR. LINDGREN: Not --

23 THE CHAIRMAN: Not the policy about the
24 licensing and how you go about it, but the actual
25 licence that was granted, say, by Order-in-Council.

1 MR. LINDGREN: For instance, Mr.
2 Chairman, I suspect that in principle there really is
3 no reason why that kind of a licence, if it has
4 significant environmental impacts - this returns us to
5 our original discussion - there is really no reason in
6 principle or in law why that couldn't be subject to
7 some sort of term and condition or recommendation by
8 the Board.

9 In any event, if the policy of
10 Cabinet-issued approvals is reviewable by the Board,
11 then certainly MNR licensing schemes or approval
12 regimes are reviewable by this Board.

13 To conclude with paragraphs 4 and 5 of
14 the Notice, Mr. Chairman, here the Ministry takes the
15 position that the issue of whether certain groups
16 should get licences, approvals, grants, loans or debt
17 guarantees and so on, is beyond the jurisdiction of the
18 Board. Now, I've already addressed the licensing and
19 licensing issues. I would like to focus on the issues
20 relating to loans, grants and guarantees.

21 First of all, let me indicate to you,
22 sir, that our position is that policies underlying the
23 issuance of loan guarantees, grants or debt guarantees
24 related to timber management are reviewable by this
25 Board. Clearly, Mr. Chairman, the Board cannot order

1 Cabinet to spend money, but if Cabinet does decide to
2 spend money on timber management, surely the Board can
3 review the applicable government policies, if they
4 exist, or to the extent they have been codified; and if
5 these policies, for example, relate to how the money
6 will be spent or where it will be spent or what groups
7 will be eligible for the money, what groups are
8 eligible for assistance in relation to timber
9 management activities, those are the kinds of policies
10 that are reviewable by this Board.

11 This flows, Mr. Chairman, from the
12 Board's obligation to examine, where necessary, and
13 address through terms and conditions any adverse
14 socio-economic impacts caused by timber management or
15 any underlying or related policies.

16 Now, on this point this morning,
17 Mr. Chairman, Mr. Freidin has said that the MNR can't
18 control the issuance or the issue of returning money to
19 a particular community, this is a matter that is
20 controlled by government or other government
21 ministries. In our view, if it is a government policy
22 related to timber management, it's reviewable by this
23 Board. As I indicated earlier, I thought the parties
24 were in agreement on that point, and I suggest
25 respectfully to you, sir, that the Board can and should

1 review those kinds of policies.

2 THE CHAIRMAN: If it's a government
3 policy to be exercised by a Ministry other than the
4 proponent?

5 MR. LINDGREN: I think the Board's
6 decision can speak to that issue.

7 THE CHAIRMAN: Bearing in mind that other
8 ministries may not be before the Board?

9 MR. LINDGREN: As I indicated earlier,
10 this issue has arisen before, and it arose in the
11 context of the Ministry of the Environment's role in
12 this undertaking. We've heard evidence --

13 THE CHAIRMAN: The Ministry is before the
14 Board.

15 MR. LINDGREN: But it's not the
16 proponent.

17 THE CHAIRMAN: No.

18 MR. LINDGREN: The example I have in mind
19 is this, Mr. Chairman: In Panel 12 the 13 we heard
20 evidence as to some MOE policies on spray buffers. You
21 may recall that depending on the product used there are
22 differing distances, different buffers that are to be
23 used.

24 I submit that it is within the
25 jurisdiction of the Board to take a look at those

1 buffers and to determine whether or not they are
2 adequate to protect the environment. Notwithstanding
3 the fact that the Ministry of the Environment is not
4 the proponent here, is not seeking approval for
5 anything, nevertheless --

6 THE CHAIRMAN: But that is because it
7 will be the Ministry of Natural Resources that will, in
8 the long run, have to apply those buffers. Is that not
9 the critical issue, that notwithstanding it may be the
10 regulation or the policy or the practice of another
11 Ministry, where it comes before this Board is because
12 in terms of the undertaking before us, the decision
13 will regulate essentially the practices of MNR or those
14 persons under MNR for which MNR has the responsibility,
15 that is the difference, as opposed to another ministry
16 which is not before the Board and for which MNR's
17 practices do not impinge, such as treasury, for
18 example.

19 MR. LINDGREN: Mr. Chairman, I think the
20 pesticide buffer policy is a good example because it is
21 not specific to the proponent, it applies to anybody
22 who wants to use those products. That is a policy that
23 applies at large to everybody in this province.

24 THE CHAIRMAN: I know, but wouldn't the
25 Board's decision be limited to the use of those

1 products within the area of the undertaking as used by
2 those persons entitled to use them within the area of
3 the undertaking; i.e., in this case, the Ministry or
4 under the eye of the Ministry?

5 We would not; would we, have the
6 jurisdiction to impose restrictions upon the use of
7 those products outside the area of the undertaking?

8 MR. LINDGREN: That is correct.

9 THE CHAIRMAN: Isn't that the determining
10 factor, differentiation over what you are saying; that
11 it has to be within the area of the undertaking and it
12 has to be a practice conducted by the Ministry which is
13 before us being regulated pursuant to this Class EA?

14 MR. LINDGREN: I'm following you to that
15 point, Mr. Chairman, but I do not agree that other
16 ministerial or government policies related to timber
17 management that are applicable in the area of the
18 undertaking, I don't agree that the Board can't review
19 those policies.

20 THE CHAIRMAN: I'm not saying we can't
21 review them; I'm saying we can review them, but any
22 recommendations or mandatory orders that we might make
23 with respect to those policies would have to be
24 applicable to the Ministry of Natural Resources and not
25 necessarily to some of these other ministries that may

1 not be before us.

2 We haven't heard their submissions or
3 their arguments on those very policies. They have not
4 necessarily submitted to the jurisdiction of this
5 Board, so to speak.

6 MR. LINDGREN: That is correct. I'm not
7 sure that we have to dwell on this much further. I
8 think we are in basic agreement, Mr. Chairman.

9 And given that, perhaps I can conclude my
10 submissions very quickly. And that is simply that, in
11 our view, the Board has the jurisdiction and the
12 authority to consider all of the matters set out in the
13 Ministry's Notice of Motion, and it follows from this
14 that the Board must allow examination and
15 cross-examination on these issues if the parties wish
16 to do so.

17 Now, in support of this position, Mr.
18 Chairman, we advance three general propositions, and
19 these basically summarize my submissions:

20 The first is that read together Sections
21 9 and 10 do not preclude this Board from considering
22 licensing regimes that are essential to the undertaking
23 or to the preferred means of carrying out the
24 undertaking.

25 The second proposition is that under the

1 provisions of the Environmental Assessment Act the
2 Board has the duty to examine the full range of
3 environmental, social, economic and cultural effects of
4 the undertaking and the preferred means of carrying out
5 the undertaking and the alternatives to it and, where
6 appropriate, the Board can impose terms and conditions
7 based on the public interest that address any adverse
8 environmental impacts or effects that occur.

9 Thirdly and finally, Mr. Chairman, we
10 submit that the licensing regime itself is a government
11 policy related to the undertaking and the carrying out
12 of the undertaking, and these policies are clearly
13 reviewable by this Board.

14 Those are our submissions, Mr. Chairman,
15 and we urge the Board to dismiss this motion.

16 THE CHAIRMAN: Thank you, Mr. Lindgren.

17 Ladies and gentlemen, the Board is going
18 to have to take a 20-minute recess at this time. I
19 have to make a call to Queen's Park before 4:00 p.m.
20 Thank you.

21 ---Recess taken at 3:37 p.m.

22 ---On resuming at 4:05 p.m.

23 THE CHAIRMAN: Thank you. Be seated,
24 please.

25 Are you next, Mr. Cassidy?

1 MR. CASSIDY: It appears so, Mr.

2 Chairman.

3 And I want to indicate at the start that
4 we support the Ministry's motion and submit that the
5 plain wording of Section 9 of the Regulation 205/87 is:
6 Licensing issues are not within the Board's
7 jurisdiction, and I have not heard anything today to
8 convince me otherwise.

9 In particular, we submit that issues of
10 whether or not the Ministry should or should not give
11 licences or loans or grants or guarantees to any person
12 or group should be left to negotiation and agreement
13 between the Ministry and parties like Mr. Hunter's
14 clients, like Mr. Colborne's clients, like my clients,
15 like Mr. Edwards' clients, or anyone else who wants to
16 enter into the activities of timber management in a
17 fashion that are consistent with the terms and
18 conditions that this Board will fashion and who the
19 Ministry decides that they want to deal with in that
20 fashion.

21 We feel that this motion that Mr. Freidin
22 has presented provides the Board with an opportunity to
23 further scope the evidence that it's going to hear at
24 this hearing, both in cross-examination of this panel
25 and in the future, and we sincerely believe that if the

1 Board does decide to hear evidence such as suggested by
2 Mr. Lindgren and the other parties in opposition to
3 this motion, that the end of this hearing is going to
4 be even further down the horizon.

5 And the only other comments I want to
6 make are in brief response or comment on some of the
7 suggestions Mr. Lindgren made with respect to the
8 inter-relationship between Section 9 and Section 10.

9 I don't accept his interpretation of
10 Section 10 and I suggest that Section 10 very clearly
11 means that where you have an undertaking which is
12 exempt by one of the provisions of this regulation, if
13 a proponent decides, notwithstanding that exemption, to
14 submit it to an environmental assessment, the full
15 provisions of the Act apply.

16 So, therefore, if there is an undertaking
17 of making a loan, or an undertaking of making a grant,
18 or an undertaking of giving a guarantee of debts or
19 issuing or granting licences that is exempt pursuant to
20 Section 9, but if a proponent in its wisdom decides to
21 put that before the Board for an environmental
22 assessment, submit an environmental assessment, then
23 the full Act applies and that is all it means. And we
24 don't have such an undertaking put before the Board
25 today or for the last 20 months; we have an undertaking

1 that is described as activities as timber management
2 activities.

3 And the concept where those particular
4 matters of loans, giving grants, giving guarantees of
5 debts or issuing are just facilitating the carrying out
6 of those activities and, for the reasons I indicated
7 earlier, I submit that those matters are not within the
8 Board's jurisdiction.

9 And the only final comment I would make
10 in respect of Mr. Lindgren's submission is they just
11 made no sense when he suggested that you can't order
12 the government to spend money, but if they do spend
13 money you can review that. I submit that the Board
14 doesn't have it with respect to one and with respect to
15 the other.

16 The question of giving a grant is very
17 clearly stated in Section 9 as being exempt from the
18 provisions of Section 5(1) of the Act. And Mr.
19 Lindgren can say that you can't order the government to
20 spend money; I submit that you can't order the
21 government in respect of whether or not they should
22 give or should not give a grant or a loan guarantee.
23 And if Mr. Colborne's clients come forward with a
24 proposal to conduct timber management and the Ministry
25 decides to give a grant to them, I don't think that is

1 a matter within the purview of the Board's jurisdiction
2 to review the merits of whether or not that grant
3 should be given or that debt guaranteed, or even that
4 licence.

5 THE CHAIRMAN: What is your position, Mr.
6 Cassidy, on whether or not a licensing regime is a
7 method of implementing or carrying out the undertaking
8 if the undertaking is defined as the activities?

9 MR. CASSIDY: It's a method of
10 facilitating that, it's a method of how the government
11 contracts to carry on those activities. Clearly the
12 Ministry of Natural Resources has decided, in whatever,
13 its wisdom...

14 THE CHAIRMAN: Well, what is meant by the
15 term or phrase 'to carry out the undertaking'?

16 MR. CASSIDY: That means implement the
17 activities in the fashion consistent with the terms and
18 conditions of approval that this Board has passed, I
19 would assume, Mr. Chairman.

20 THE CHAIRMAN: Okay. But when you take
21 the Sections of the Act, Section 5(3) which requires
22 the proponent to assess the alternative methods, the
23 reasonable alternative methods of carrying out the
24 undertaking, would it in your view have to assess the
25 licensing regime which is one facet of how the

1 undertaking is carried out or implemented?

2 MR. CASSIDY: Not with respect to who
3 carries it out, the undertaking. In other words, if
4 the Ministry decides to contract certain work for
5 person "A" as opposed to person "B", I submit that it's
6 not within the purview of the legislation and your
7 jurisdiction pursuant to Section 9 of the regulation.

8 And Section 9, I submit, clearly
9 delineates --

10 THE CHAIRMAN: Just a moment. Forget for
11 a moment whether it's within or without the
12 jurisdiction of the Board, is it a requirement of the
13 proponent to assess that as part of the EA?

14 MR. CASSIDY: I submit within the context
15 of Section 9 it's not a requirement of the proponent to
16 assess that.

17 THE CHAIRMAN: What about when you read
18 Section 10 in there?

19 MR. CASSIDY: Section 10 would only apply
20 if they decided to submit to the jurisdiction of the
21 Board an undertaking of that type of a loan, or of a
22 licence, or of et cetera. The licensing scheme is not
23 before the Board.

24 THE CHAIRMAN: They have submitted to the
25 Board an undertaking to carry out certain activities.

1 MR. CASSIDY: Activities.

2 THE CHAIRMAN: Now, are they required
3 pursuant to the statute, because they have submitted
4 that undertaking, to assess the manner in which they
5 will carry out that undertaking?

6 MR. CASSIDY: Oh yes, to assess the
7 manner in which they will carry out it, but...

8 THE CHAIRMAN: And does that include--

9 MR. CASSIDY: No.

10 THE CHAIRMAN: --licensing provisions?

11 MR. CASSIDY: No.

12 THE CHAIRMAN: Or a licensing regime?

13 MR. CASSIDY: I submit not, and with
14 respect, Mr. Chairman, you cannot divorce Section 9
15 from that; if you could...

16 THE CHAIRMAN: But Section 10 must mean
17 something.

18 MR. CASSIDY: Yes. If the Ministry had
19 decided to include licensing within the purview of the
20 undertaking; in other words, in the description of the
21 undertaking before the Board, when they submit an
22 undertaking that includes licensing for an
23 environmental assessment, assuming they do that, then
24 Section 10 would kick in and say: When that type of an
25 undertaking is submitted, the full Act applies.

1 THE CHAIRMAN: Okay. And suppose they
2 had done that, just to follow your logic.

3 MR. CASSIDY: Yes.

4 THE CHAIRMAN: How would they then
5 describe or assess how they would carry out that
6 undertaking if licensing were described as part of the
7 undertaking?

8 MR. CASSIDY: If they were to include
9 licensing as part of their undertaking, they would, I
10 would assume, embark into a lengthy discussion of the
11 merits of various types of licensing, with regard to
12 the merits of various types of contracts, with regards
13 to the merits of various types of grants, with regard
14 to various types of debt guarantees and I would submit
15 that would be included right in their description of
16 the undertaking.

17 But by my reading of their description of
18 the undertaking, that is not what they submitted to
19 this Board.

20 THE CHAIRMAN: Okay. And we are not
21 putting any credence whatsoever - I'm not suggesting
22 you necessarily should - on the EA Update and the
23 explanation of Section 9 vis-a-vis any significant
24 environmental impact which may take it out of Section
25 9.

1 MR. CASSIDY: It's not in Section 9.

2 THE CHAIRMAN: No, I know it's not in
3 Section 9, we've covered that.

4 MR. CASSIDY: Yes, and I agree with that.
5 In light of the fact that it's not in there, to me,
6 it's very nice of the EA Update to state. The fact is
7 it's not in there, and if you accept my understanding
8 of Section 10, which I submit is appropriate on the
9 face of its reading, then that is not relevant and it
10 avoids the pitfall that you mentioned about who
11 determines the environmental significance.

12 You don't have that problem if you accept
13 my understanding of the relationship of Section 9 and
14 Section 10. You do have that problem if you accept Mr.
15 Lindgren's, with greatest respect, somewhat unusual
16 importation of terms in a section of the regulation
17 which aren't there. If the Ministry wanted to state
18 that in the drafting they should have, but they didn't.

19 Those are my submissions, Mr. Chairman.

20 THE CHAIRMAN: Thank you.

21 Well, Ms. Seaborn, it's your Act and it's
22 your regulation and it's your EA Update. Let's hear
23 what you have to say about it all.

24 MS. SEABORN: With that sort of an
25 introduction, Mr. Chairman, this is going to be tough.

1 Now, Mr. Chairman, I would like to begin
2 by quickly summarizing our position on the motion today
3 and then I will go into reasons for the position that
4 we are taking.

5 With respect to the Notice of Motion, on
6 the first page there are five matters that are
7 enumerated beginning partway down page 1. With respect
8 to items 1, 2 and 3, it is our submission that these
9 are matters that are clearly within the jurisdiction of
10 the Board to receive evidence on and to consider.

11 With respect to items 4 and 5, it is our
12 position that in the context of the Class EA these are
13 not relevant matters insofar as the Board does not have
14 the jurisdiction to specifically identify individuals
15 or groups that wish to receive licences or grants, or
16 the other wording that has been put in the first part
17 of the Notice of Motion by the Ministry, and I will go
18 into the reasons for our submissions on those five
19 points.

20 I would like to start off with the much
21 discussed today regulations under The Environmental
22 Assessment Act and Section 9. I can advise the Board
23 that through my investigations I have found that there
24 are no reported cases that have interpreted Section 9
25 of the regulations.

1 THE CHAIRMAN: Surprise, surprise.

2 MS. SEABORN: And it was considered
3 briefly in what is known as one of the Dome Stadium
4 cases, however, it was only raised in a factum and I
5 believe it was the Ontario Municipal Board did not have
6 to go on to look further at that regulation. That was
7 the only reference that we could find to Section 9 of
8 the regulations.

9 With respect to the Environmental
10 Assessment Update, which has also been referred to
11 throughout these proceedings, there is no other
12 statement that I could find to provide to the Board
13 from the EA Branch in the same form as was provided by
14 Mr. Freidin referring to the regulations.

15 Now, having said that, our position of
16 Section 9 of the regulations is very simple. In our
17 submission, all it does is make it clear that the
18 actual activity of issuing or granting a licence is
19 exempt from the environmental assessment process. So,
20 for example, where a proponent has received approval to
21 carry out an undertaking, certain licences may
22 thereafter require issuance.

23 The issuance of those licences are exempt
24 from the EA process. So once you receive approval to
25 proceed with an undertaking, and the next step is to

1 issue the appropriate licences to carry out the
2 undertaking, a proponent does not have to, at that
3 stage, prepare a subsequent environmental assessment in
4 order to receive those licences.

5 THE CHAIRMAN: That is based on prior
6 approval?

7 MS. SEABORN: That's correct. And so in
8 our submission that is really all Section 9 of the
9 regulations is there to do, it is an administrative
10 provision and that is referred to in the EA Update on
11 the notes that refer to the sections of the regulation
12 saying that these regulations are there for
13 administrative purposes as a practical matter.

14 And using this undertaking as an example,
15 assuming the Board gives approval for the undertaking
16 to proceed, the Ministry of the Environment would no
17 longer be operating under the exemption order, they
18 would have approval from this Board and presumably from
19 the Minister at that point in order to carry out the
20 activities of timber management. Instead of operating
21 under an exemption order, licences would then be issued
22 and, in our view, what Section 9 of the regulation says
23 is, that you have got approval, you don't have to go
24 back and do any consideration of alternatives that are
25 required under the Environmental Assessment Act in

1 order for those licences to be issued.

2 THE CHAIRMAN: Okay. But if I'm reading
3 you correctly, you have got approval and you have got
4 approval under the Environmental Assessment Act, and
5 does that mean, in effect, you have already canvassed
6 the alternatives to the licensing regime, the way in
7 which to implement and carry out the undertaking, the
8 activities, therefore, you don't have to come back
9 again and get it twice. You just issued a licence
10 based on the approval.

11 So now you are going to answer the more
12 important point.

13 MS. SEABORN: That's right.

14 THE CHAIRMAN: Is it within the Board's
15 jurisdiction to canvass the licensing regime as part of
16 the Board's approval vis-a-vis the undertaking that is
17 before the Board; namely, the particular activities?

18 MS. SEABORN: That's correct. And our
19 simple answer to that is, yes, the Board does have that
20 jurisdiction.

21 Now, just continuing on in terms of the
22 interpretation of Section 9 of the regulations. In our
23 submission the interpretation is fortified by Section
24 6(1) of the Act which I don't think has been referred
25 to today, and Section 6(1) of the Environmental

1 Assessment Act says that:

2 "No licence required under any statute,
3 regulation, by-law or other requirement
4 of the province, an order to proceed with
5 an undertaking shall be issued or granted
6 unless the Minister has approved the
7 environmental assessment."

8 Now, the alternative to Section 6(1) is
9 operating as we have the case now in terms of timber
10 management, pursuant to Section 29 where the Minister
11 can exempt an undertaking, and that goes back to the
12 situation I referred to earlier where that operations
13 under an exemption order can allow licences to be
14 granted to allow the activities of access, harvest,
15 renewal and maintenance.

16 So, in our view, because Section 6(1)
17 stipulates that:

18 "No licence required under any
19 statute..." et cetera, "...an order to
20 proceed with the undertaking shall be
21 issued or granted unless the Minister has
22 approved the environmental assessment",
23 that means that you are essentially operating pursuant
24 to an exemption order in terms of licences until you
25 get that approval from the Board. And if you look at

1 Section 9 of the regulation it refers to the
2 undertaking of making a loan, giving a grant, et
3 cetera.

4 An undertaking is defined in Section 1(o)
5 of the environmental assessment to mean, in one
6 instance, an activity. So, in our view, again going
7 back to my original comment, it's the actual activity
8 of issuing that licence that is exempt not I think what
9 are probably the more important considerations, Mr.
10 Chairman, as you said in terms of the environmental
11 effects -- potential environmental effects which would
12 largely be socio-economic in terms of a licensing
13 regime.

14 Now, the second submission I would like
15 to make is that MNR has said itself in the
16 environmental assessment at page 13 that regardless of
17 the form of the licence and regardless of who is
18 granted the licence, all the activities must conform to
19 a timber management plan approved by MNR.

20 THE CHAIRMAN: Excuse me. Just to get
21 something clear.

22 MS. SEABORN: Yes.

23 THE CHAIRMAN: Going back to 6(1), are
24 you somehow reading as part of that Section 29? Do you
25 have to take into account the exemption sections in 29

1 to follow through, that:

2 "Where the Minister hasn't accepted
3 the assessment and hasn't given approval
4 to proceed..."

5 And if you read the subsection too,
6 subsection 1 does not apply to these things in relation
7 to a feasibility study including research, or for any
8 action necessary to comply with this Act before the
9 approval of the Minister is given to proceed with the
10 undertaking, but there has been an exemption order
11 issued pursuant to 29.

12 MS. SEABORN: That's right.

13 THE CHAIRMAN: So you have to read 29
14 with Section 6, is that...

15 MS. SEABORN: That is what I'm saying, is
16 that you are -- as a proponent, because you have a
17 requirement -- assuming you are a proponent who falls
18 within the definition of the Act and you have a
19 requirement to prepare an environmental assessment, if
20 you want to carry out operations while that
21 environmental assessment is being considered, whether
22 it's by the Board or by the Minister, the way in which
23 you are going to carry out your activity is through an
24 exemption order.

25 THE CHAIRMAN: Unless you fall within

1 that limited range of exemptions in subsection (2) of
2 Section 6?

3 MS. SEABORN: That's correct.

4 THE CHAIRMAN: Which doesn't apply in the
5 context of what we are talking about?

6 MS. SEABORN: That would be my
7 submission.

8 THE CHAIRMAN: Okay.

9 MS. SEABORN: Now, in our view, the
10 evidence at least in terms of what has been provided in
11 the environmental assessment is that timber management
12 activities are licensed in a variety of different ways
13 and, in our view, if there is a strong socio-economic
14 argument that benefits of timber management can be
15 enhanced if a licence is granted in a particular
16 priority, that is a legitimate area that can be
17 canvassed by any intervenor in this hearing.

18 The reason why we say that is that, as
19 you are aware, Mr. Chairman, the purpose of the
20 Environmental Assessment Act as set out in Section 2,
21 it's a very broad purpose. The definition of
22 environment is very broad as well, and clearly by the
23 Ministry's own evidence, the potential socio-economic
24 effects of the activities of harvest, renewal,
25 maintenance and access are clearly at issue in the

1 hearing.

2 Now, if an intervenor can convince the
3 Board that socio-economic benefits will accrue to his
4 or her client through the imposition of requirements
5 that have followed would materially change the
6 advantages or the disadvantages of the undertaking,
7 then the Board should consider that evidence.

8 Just returning for a moment to the five
9 points in the Notice of Motion, I would like to deal
10 with each of them briefly.

11 THE CHAIRMAN: Okay. Just before you get
12 to that. If, based on your last statement that is
13 true, what does that do, in your view, to already
14 existing licensing arrangements: If a party could come
15 forward and persuade presumably the Board that a
16 different licensing arrangement would have a less
17 damaging socio-economic impact upon that particular
18 stakeholder, and what they are trying to convince the
19 Board of does not exist in the particular licensing
20 arrangement that is in place, what are you indicating
21 are the Board's powers, jurisdictionally to do at that
22 stage?

23 MS. SEABORN: I don't think the Board can
24 issue any retroactive orders. I think what the Board
25 can do is make recommendations. If the Board is

1 persuaded that there are negative effects, and these
2 would be I assume socio-economic effects, and there is
3 a way of remedying these effects through changing an
4 aspect of the timber management planning process, and
5 given that MNR has said that any licences that are
6 issued must be done in accordance with the terms and
7 conditions of this approval and with the timber
8 management planning process, then I would say it would
9 affect any licences issued by the Minister after the
10 date of this decision.

11 THE CHAIRMAN: Okay. Let's talk in more
12 cogent, practical terms. Suppose it's an FMA
13 agreement, and if I understood some of the evidence
14 correctly some of these FMA agreements, although
15 reviewable, unless there has been default are renewed
16 effectively for a further period of time; in other
17 words, almost in perpetuity, in the sense that you move
18 forward the licensing period from the point of review
19 for a further period of - I forget the number of years,
20 20 years or something like that.

21 If that is the case, what are you
22 suggesting the power of the Board would be if it is
23 convinced that a different licensing arrangement should
24 be entered into or considered at a renewal period?
25 There may not be default. What I'm trying to get at

1 is: There may be a valid FMA signed, there may be no
2 default with the terms of that specific FMA, one of the
3 terms indicates that if there is no default it gets
4 automatically renewed.

5 If we wanted to change the renewal period
6 to something else or we wanted to say that at the next
7 renewal a different licensing arrangement should be
8 considered with perhaps a different term and perhaps
9 even different types of provisions because we are
10 convinced that the socio-economic impact of that kind
11 of licensing arrangement is detrimental to the
12 environment and to a particular stakeholder, are you
13 suggesting that we can change something on that basis
14 at the next renewal?

15 MS. SEABORN: I think what you can do is
16 make recommendations that the Ministry make changes.
17 And then the next point - and I just don't have the
18 answer to this because I'm not familiar enough with the
19 conditions of the FMA agreements - would be to have a
20 look at the legislation that governs the FMA agreements
21 and presumably Cabinet would be in a position, or the
22 government would be in the position of having to decide
23 to either pass new legislation or enact new regulations
24 with respect to the FMA agreements.

25 THE CHAIRMAN: Well, could the Board say

1 something to the effect that this approval shall be in
2 force until the next renewal?

3 MS. SEABORN: I think so.

4 THE CHAIRMAN: At which time it's the
5 recommendation of the Board that other licensing
6 arrangements pursuant to conditions of approval should
7 be entered into; if they aren't entered into at that
8 point the approval lapses. I mean, is that a
9 feasibility?

10 MS. SEABORN: I think so.

11 THE CHAIRMAN: A possibility?

12 MS. SEABORN: Yes.

13 MR. FREIDIN: Could you run that one by
14 me, Mr. Chairman, to make sure I understand it and I
15 can perhaps respond, not now but...

16 THE CHAIRMAN: Well, the Board was
17 considering out loud that if what Ms. Seaborn is
18 indicating is - if her client's position is correct -
19 that the Board could in fact hear evidence and, if
20 persuaded that certain licensing arrangements or
21 regimes were inadequate in the Board's view to protect
22 the environment in terms of meeting whatever criteria
23 the Board sets in that area, that the Board was
24 suggesting that if it couldn't change the terms of an
25 already executed agreement, and because the agreements

1 have automatic renewal provisions, if there is not
2 default, where does that allow the Board to influence
3 the terms of that kind of agreement where there isn't
4 default?

5 And the suggestion was, is that the Board
6 perhaps could issue its approval which would be in
7 force vis-a-vis those kinds of licences or licensing
8 arrangements up until a particular point with
9 recommendations that something changes after that
10 point.

11 MR. FREIDIN: Well, with the following
12 sequence: That if those things didn't effect, those
13 licences would be null, those licences issued by the
14 Ministry of Natural Resources would, therefore, be null
15 and void under the Act.

16 THE CHAIRMAN: Well, with the effect that
17 the approval upon which those licenses rely would no
18 longer be in force with, I guess, the practical effect
19 that the licences would be of no effect. The same way
20 as when you look at Section 6 of the Act, if there
21 isn't an approval, the licence that might have been
22 issued is of no force.

23 I'm not suggesting that is a position the
24 Board is going to take or anything like that, I'm just
25 trying to follow through from Ms. Seaborn's comments,

1 that if this is within the jurisdiction of the Board,
2 how in practical terms does the Board exercise that
3 jurisdiction; should it be persuaded that it should be
4 exercised, that jurisdiction?

5 MS. SEABORN: Mr. Chairman, I would just
6 like to deal briefly again with the five points that
7 are raised in the Notice of Motion. There are a number
8 of matters that MNR has enumerated, being matters that
9 do not fall within the jurisdiction of the Board.

10 With respect to the first issue, whether
11 privately owned forests constitute an alternative to
12 the undertaking. In our view, this is no different
13 from any other alternative that either the proponent or
14 an intervenor might want to raise in front of the
15 Board. This is not a question of jurisdiction and the
16 Board to consider it. In our view, it's a question of
17 evidence.

18 Whether privately owned forests
19 constitutes an alternative to the undertaking is a
20 question of evidence, and while MNR has not raised this
21 explicitly as an alternative to the undertaking, if
22 another party wants to suggest this as an alternative
23 to the undertaking, they would have to convince the
24 Board either that it was an alternative to the
25 undertaking such that the Board should reject the

1 environmental assessment, or convince the Board that it
2 was an alternative method of carrying out the
3 undertaking and that the undertaking should be carried
4 out in that fashion.

5 So, in our submission, Item 1 really
6 isn't something that needs to fall within the purview
7 of this Notice of Motion as something that can be dealt
8 with by any --

9 MR. CHAIRMAN: Excuse me a moment.
10 Sorry, Ms. Seaborn.

11 MS. SEABORN: In our view, the analysis
12 of alternatives is clearly the cornerstone of the
13 Environmental Assessment Act. And I have some sympathy
14 for Mr. Lindgren, I believe it was his submission, with
15 respect to this item being raised in the Panel 17
16 evidence at page 11 of that evidence, alternative A,
17 the heading is: Private Lands/Import, and that goes on
18 to what MNR describes as the do-nothing or null
19 alternative. And, in our view, it is just not
20 something that is properly the subject of an order.

21 With respect to Items 2 and 3, in our
22 view, these are matters that can really be considered
23 planning matters in the sense that MNR has said in the
24 environmental assessment that any licences that are
25 issued have to conform to a timber mangement plan that

1 is approved by MNR.

2 And, again, I would repeat my comments
3 earlier. If an intervenor can show the Board either
4 through cross-examination or through introduction of
5 their own case that, for example, a larger size or
6 smaller size forest management agreement would be
7 beneficial to their client in the sense of the
8 advantages of proceeding in that fashion outweighing
9 the disadvantages, then it's up to that party to lead
10 that evidence.

11 I have a little more difficulty with
12 Items 4 and 5 in the sense that in the context of a
13 Class EA I agree with MNR, that I don't think it's
14 appropriate for the Board to be issuing a ruling that
15 would give to certain individuals or certain groups
16 licences, for example, or permits per se.

17 We are not dealing with an individual EA
18 where you have a proponent in front of you saying: I
19 want to receive a permit to conduct this particular
20 activity; we are dealing with a common planning process
21 and, in our view, Items 4 and 5 are probably items that
22 the Board can't, in a practical matter, deal with.

23 Having said that, I understand from Mr.
24 Colborne and Mr. Hunter's submissions that they are not
25 suggesting, in any event, that the Board can

1 specifically say that one of their clients, for
2 example, should receive a licence to conduct activities
3 on a particular piece of land and it's not my
4 interpretation that that is what they are asking for in
5 any event. So with respect to Items 4 and 5 it may be
6 a moot point.

7 Mr. Colborne referred earlier on to a
8 distinction between cross-examination and calling
9 evidence-in-chief. Rather than making that
10 distinction, I think what I would submit to the Board
11 is that, as a practical matter, the Environmental
12 Assessment Board has historically taken the position
13 that if evidence is relevant they will hear such
14 evidence.

15 And, in our view, it is always open to
16 the Ministry and any other party at the end of the case
17 to argue that certain terms and conditions would be
18 inappropriate either for legal reasons or for practical
19 reasons. Regardless of the questions in
20 cross-examination and the evidence that is called by
21 the intervenors, the proponent will still have that
22 chance; and the proponent, of course, always has the
23 opportunity to call evidence in reply.

24 And I think that, in our submission,
25 making an order such as the broad wording of the order

1 that is asked for by MNR at this stage in the hearing
2 would be inappropriate for the reasons that I have
3 enumerated.

4 Subject to any questions from the Board,
5 those are my submissions.

6 MR. CHAIRMAN: Thank you.

7 Mr. Freidin, are you prepared to go on
8 with...?

9 MR. FREIDIN: I'm going to probably be
10 some time. It might be more appropriate to deal with
11 this tomorrow. I think I am going to be in excess of
12 an hour.

13 MR. CHAIRMAN: Okay. I think we will
14 adjourn until tomorrow. It's been a relatively long
15 day and that will give you an opportunity to review
16 what has come forward today.

17 Very well, ladies and gentlemen, we'll
18 adjourn until 8:30 tomorrow morning. Thank you.

19 Mr. Freidin, I think that subsequent to
20 your presentation tomorrow we can continue right on
21 with the Panel 17, at least for direct. In view of
22 what has occurred and in view of the complexity and the
23 depth of the issues raised before the Board, we may not
24 be as successful in rendering a decision on this motion
25 as quickly as we otherwise thought we might be able to.

1 We would like to be in a position to
2 review the transcripts of today's submissions in detail
3 before we render such a decision. But how long are you
4 going to take in direct with this panel?

5 MR. FREIDIN: I think we are probably now
6 going to take the better part of a day, probably five
7 to six hours. That is the result of spending more time
8 than we thought dealing with specific issues.

9 MR. CHAIRMAN: Are we going to be into
10 cross-examination before we rise this week?

11 MR. FREIDIN: Yes, that is the case, that
12 is highly likely.

13 MR. CHAIRMAN: Well, we may end up having
14 to give some kind of ruling with reasons to follow
15 because, again, the Board feels that this whole matter
16 is of some import to this hearing in its overall
17 context and we are not convinced that it shouldn't be
18 given appropriate and full consideration. So we'll
19 have to see how it comes in tomorrow as to how long
20 it's going to take.

21 MR. CASSIDY: Mr. Chairman, just before
22 we leave, if I can just raise minor procedural point.
23 I notice that on January 17th, which is next Wednesday,
24 the scoping session for OFIA/OLMA Panels 1 and 2 is
25 scheduled, and I'm not clear whether that is for the

1 morning, afternoon or evening.

2 And the reason I need to know - and I
3 don't need to know right now - if you can advise me
4 some time during the course of the week so I can advise
5 Mr. Cosman who is planning on being here for that
6 session. If it is in the evening, of course, he'll
7 make the appropriate flight arrangements. I just
8 thought I should mention it now so you can reflect on
9 it.

10 MR. CHAIRMAN: I don't believe we set a
11 time.

12 MR. CASSIDY: No, I don't believe we did.
13 So if you want to think about it, that is fine, Mr.
14 Chairman, I just thought I would ask for that
15 clarification.

16 MR. CHAIRMAN: And then on the 18th we
17 have Mr. Hanna's motion, and I believe it's the 16th
18 that submissions regarding that motion are to be
19 submitted.

20 MR. CASSIDY: If I were to read Mr.
21 Cosman's mind, I would suggest that he would probably
22 ask for the evening of the 17th so he can fly in and
23 then appear on the motion the next morning as well, but
24 I'm in your hands on that.

25 MR. CHAIRMAN: Okay. We'll let you know

1 tomorrow.

2 MR. CASSIDY: Thank you.

3 MS. SEABORN: Just for the record, and it
4 was my understanding that it was just Panel 1 of the
5 industry case that was going to be scoped next week. I
6 guess we'll all have to check the transcript, but --

7 MR. CHAIRMAN: I think it was our
8 understanding it was one.

9 MS. SEABORN: Certainly it was my
10 understanding the deadline for filing of statement of
11 issues is tomorrow on Panel 1 but not on Panel 2, a
12 time hasn't been set for that.

13 MR. CHAIRMAN: And we didn't think we
14 would get much beyond Panel 1 before the negotiating
15 break. We also noticed that there has been evidence
16 filed or statement of issues filed on the clearcut
17 issues, so I take it that comes after 17 as well.

18 MR. FREIDIN: If you like, Panel 10(b) we
19 would like to refer to it as.

20 MR. CHAIRMAN: Thank you. 8:30 tomorrow.

21 ---Whereupon the hearing adjourned at 4:45 p.m., to be
22 reconvened on Wednesday, January 10th, 1990,
commencing at
23 8:30 a.m.

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